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Volume 9

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 9

FEDERAL TRADE COMMISSION, PETITIONER

vs.

THE CEMENT INSTITUTE, et al.

No. 10

FEDERAL TRADE COMMISSION, PETITIONER

vs.

ATLAS PORTLAND CEMENT COMPANY, et al.

No. 11

FEDERAL TRADE COMMISSION, PETITIONER

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY

No. 12

FEDERAL TRADE COMMISSION, PETITIONER

vs.

CALAVERAS CEMENT COMPANY, et al.

No. 13

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HURON PORTLAND CEMENT COMPANY

No. 14

FEDERAL TRADE COMMISSION, PETITIONER

vs.

SUPERIOR PORTLAND CEMENT, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1948.

CERTIORARI GRANTED MARCH 29, 1948.

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18907 Washington, D. C.,
April 6, 1939.

18908 JOHN P. SIMPSON thereupon resumed the stand and testified further as follows:

Direct Examination (Continued).

18910 By Mr. Wooden:

Q. Mr. Simpson, I think in your last answer last evening you made some reference to the possibility of omission or error in the checking that you had done and about which you were testifying.

Mr. Leisure: His last answer had to do with
18911 Kosmosdale and Union Port, Ohio, as I have it.

Mr. Wooden: My memory is at fault, then.

By Mr. Wooden:

Q. It was late in the session, almost at the close, so I will modify the question to that extent.

A. Every rate in this statement—

Q. I want you to give the facts which will enable us to judge the extent or degree of that possibility that you refer to.

A. Every rate in this statement is, in my opinion, after a careful study of the tariff, the rate shown in that tariff over some route from the point of origin to the point of destination.

It is possible, but not probable, that in some tariffs there might be a lower rate.

I have made a fairly—a rather thorough search. I seriously doubt that such exist, but owing to the fact that in the case of two West Virginia rates the rate book named a lower rate than I was able to find I qualified my answer so as to make it possible to make a correction in the event a lower rate is called to my attention, and if a lower rate is called to my attention I will be glad to look into it.

Mr. Leisure: You say "in this statement". I take it that you are referring to Exhibit 3048, for identi-
18912 fication?

The Witness: Yes, sir.

Mr. Wooden: His statement in connection with the

checking of thes rates that are in the paper you have given the numbe.

Mr. Leisure: (Addressing the witness) What did you say?

Mr. Wooden: His statement—

Mr. Leisure: I am asking him which statement.

The Witness: I meant the statement I have quoted thus far, having read from, this exhibit.

Mr. Leisure: Which is Exhibit 3048?

The Witness: That is right.

By Mr. Wooden:

Q. Now, Mr. Simpson, showing you Exhibit 1110-E being the Illinois rate book of the Institute effective August 15, 1934, and Exhibit 3013-E, I will ask you to refer to those exhibits and then give us the result of your checking with the official tariffs on file at the Interstate Commerce Commission of the rate between Osborn, Ohio, and Addington, Illinois.

A. Exhibit 1110-E bears an effective date of August 15, 1934.

Therein is show a rate of 11 cents per 100 pounds from Osborn to Addington.

Mr. Leisure: Eleven cents was that, Mr. Simpson?

18913 A. Yes, sir.

(Referring to data) In Commission's Exhibit 3013-E there is shown a rate of 17 cents from and to the same point. The tariffs on file in the Interstate Commerce Commission—

Q. When was that effective?

A. Oh, I beg your pardon.

(Referring to data) That was in a sheet issued October 17, 1934, effective at once.

The lowest rate which I was able to find on August 15, 1934, was 17 cents. That rate, except as adjusted by the —I am changing my answer—that rate remained in force until—or through the period October 17, 1934, and it was 6 cents lower than that shown in the Institute Rate Book for that six months' period,—or two months' period, I should say.

Q. Did you say lower?

A. Six months higher than that shown in the Institute Rate Book for that two months' period.

Q. Now, referring to the same exhibits, the rate book

for Illinois, and the correction sheets for Illinois, exhibit numbers which you will give,—what was the result of your checking with the official tariffs on file at the I.C.C. of the rate between Osborn, Ohio, and Grand Tower, Ill.?

A. (Referring to data) The rate book showed that effective August 15, 1934, the rate was 13 cents.

18914 The correction sheet of Commission's Exhibit 3013-E showed the rate as 17 cents. In this instance I find—

Q. When was that effective?

A. That was effective the same date, October 17, 1934, effective at once.

Mr. Leisure: Mr. Wooden, Mr. Simpson did not give us the authority on the last one.

Would you mind giving us that?

The Witness: I will.

Mr. Leisure: You neglected that.

The Witness: Yes.

Mr. Wooden: Will you give us that?

Mr. Leisure: That is the Osborn-Addington.

The Witness: Continuing, I will give you both of them at one time.

Mr. Leisure: Yes; thank you.

The Witness: I find that the 17-cent rate filed with the tariff of the Interstate Commerce Commission was the lowest rate which apparently was available on August 15, 1934, and remained in force for the next two months, although the rate book showed a 13-cent rate, a difference of 4 cents.

The Addington rate, on both dates, was named in Big Four Tariff No. 1156-Q, Cleveland, Cincinnati, Chicago, and St. Louis I.C.C. No. 8581, page 14.

18915 The same rate was named in Erie Railroad Tariff No. 117-J, I.C.C. No. A-7137, pages 4 and 13.

The rate to Grand Tower on both dates was named in the Big Four Tariff mentioned above, page 12, item 10, and page 62, using the Wolf Lake rate, and the Erie tariff mentioned above, pages 45, rule 15 and 52, using the Wolf Lake rate, Illinois Central I.C.C. No. A-10441, indices 308 and 310 shows that Grand Tower is intermediate to Wolf Lake, Ill.

By Mr. Wooden:

Q. Now, referring to those same exhibits, consisting of the Illinois Rate Book and the Illinois correction sheets,

what were the results of your checking the official tariffs on file at the I.C.C. of the rate between Osborn, Ohio, and Millbrig, Ill.?

A. The rate book showed effective August 15, 1934, a rate of 14 cents (referring to date).

The correction sheet—there seems to be some error, Mr. Wooden. This correction sheet does not name a rate from Osborn to Millbrig.

Q. Do you have No. 50, correction sheet?

A. Yes, sir.

Q. I will show you Exhibit 1110-F, the rate book of the Institute for Indiana, effective June 19, 1934, and Exhibit 3014, the correction sheets for Indiana, and will ask you to state the results of your checking with the
18916 official tariffs on file at the Interstate Commerce Commission of the rate between Detroit, Mich., and Evansville, Ind.

A. The Indiana Rate Book No. 2 is effective June 19, 1934. It names a rate from Detroit to Evansville of 15½ cents. An unnumbered sheet following Commission's Exhibit 3014-XX—I beg your pardon, the sheet is numbered 3014-YY:

3014-YY, bearing date of February 25, 1938—the issue date of the sheet is not shown—however, it shows a rate from Detroit to Evansville by reference mark, explained, effective at once, 18½ cents.

Q. Effective what date?

A. Effective at once. There is no issue date shown.

Let me verify that, now (referring to data): Perhaps the issue date of February 19, 1938, in connection with the Exhibit 3014-XX was intended to cover 3014-YY. I didn't see the sheets as they were issued, so I can't say.

Q. Is that your belief?

A. That is my belief; yes, sir; from the construction of the sheet.

Q. Do you find that the alphabetical list on the two sheets is continuous?

A. 3014-XX has a group of stations from Abbott to King-Davies Counties. 3014-YY starts with King-Gibson County and runs to Young and is, evidently, a continuation of the alphabet.

18917 Q. Do I understand, then, that you believe the rate from Detroit to Evansville was effective February 19, 1938?

A. That would be my impression; yes, sir; my opinion.

18918 Q. Go ahead with your results of your checking.

A. I found a rate of 20 cents in a Michigan Central tariff, 9832 series, but I failed to note the I.C.C. number in force on the opening date of June 19, 1934.

Four years later there was in I.C.C. 9832-H, I.C.C. 5908, page 57 and supplement 35 and 62, a rate of 18½ cents.

The history of this rate has been the rate of 20 cents continued in force from June 19, 1934, until June 24, 1935.

Beginning with June 25, 1935, running to November 14, 1937, the rate was 17½ cents subject at times to the emergency charge.

On and after November 15, 1937, the rate was 18½ cents.

Trial Examiner Norwood: What discrepancies does that show between the book and tariff?

The Witness: The book during the entire period showed, so far as has been pointed out to me by Mr. Wooden, showed a rate of 15½ cents which was two or three cents lower than the rate in force during the latter portion of the period and 4½ cents lower than the rate at first.

By Mr. Wooden:

Q. The correction sheet put in the right rate?

18919 A. The correction sheet put in the proper rate but several years after it was changed.

Q. Now showing you Exhibit 1110-I, being the Kentucky Rate Book of the Institute, effective December 8, 1933, and Exhibit 3017, the correction sheets for the Kentucky Rate Book, I will ask you to give the results of your checking of the official tariffs on file at the I.C.C. with the rate from Ironton, Ohio, to Cornett, Kentucky (handing the documents to the witness).

A. (Referring to data.) Kentucky Rate Book No. 2 bears the effective date of December 8, 1933.

The rate from Ironton to Cornett is shown 14 cents.

Q. You mean in that book?

A. In this rate book; as of December 8, 1933.

Approximately one month later, issued January 9, 1934, and effective at once, Commission's Exhibit 3017-A shows a rate between the same points of 17 cents.

The tariffs examined in the file with the Interstate Commerce Commission indicate that the 17-cent rate was in

force throughout that period, the rate book showing a rate of 3 cents lower than that named in any tariff that I found.

The authority for that rate of 17 cents is the Highsplint, Kentucky, rate shown in Southern Freight Association cement tariff 341-A, Agent F. L. Spieden's, I.C.C.
18920 No. 1626, page 91, and Agent J. H. Glenn, Rate Basis Book, I.C.C. No. A-725, page 266, index No. 50225.

18921 Q. Now, Mr. Simpson, take the same rate book for Kentucky, and the same correction sheets for Kentucky that you have just referred to, and tell us the results of your checking of the tariffs on file at the I.C.C. of the rate from Universal, Pa., to Cobb, Ky.

A. (Referring to date.) Effective December 8, 1933, Kentucky Rate Book No. 2 showed a rate of 14½ cents from Universal to Cobb.

Commission's Exhibit No. 3017-E showed a rate of 24½ cents in a sheet issued February 2, 1934, and effective at once, that being practically two months after the rate book was issued.

The lowest rate which was found in any tariff in the Commission was 24½ cents. It is possible that the rate of 14½ cents shown in the rate book was a typographical error, nevertheless it was 10 cents lower than that named in the tariffs examined.

The rate found of 24½ cents was named as the Cerulean, Ky., rate in Jones' I.C.C. No. 2549, page 42, and Jones' I.C.C. No. 2145, page 98, index No. 37420.

Q. Now, referring to the same rate book and the same correction sheets, tell us the results of your checking with the official tariffs on file at the I.C.C. of the rate from Buffington, Ind., to Asa, Ky.

A. Effective December 8, 1933, the rate book
18922 showed 27 cents from Buffington to Asa,

Q. What exhibit number is that?

A. Exhibit 1110-I.

(Referring to data.) The Commission's Exhibition No. 3017-E, issued February 2, 1934, effective at once, named a rate of 24 cents from and to the same points.

The tariffs examined in the Interstate Commerce Commission indicates that the rate of 24 cents was in force during this two months' period, although the 27-cent rate was erroneously named in the rate book.

The 24-cent rate to which I have alluded was named in Central Freight Association Tariff 449-E, Agent Jones' I.C.C. No. 2549, page 48.

Q. Now, will you look at the same rate book of the Institute and the same correction sheets for Kentucky, and tell us the results of your checking with the official rates on file at the I.C.C., of the rate between Universal, Pa., and Scottsville, Ky.

A. (Referring to data.) The rate book effective December 8, 1933, names a rate of 12½ cents from Universal to Scottsville.

The correction sheet, 3017-F, which has the appearance of having been issued on February 2, 1934—

Q. Why do you say "has the appearance"?

A. The sheet itself does not bear any date, but it apparently follows sheet 3017-E, which bore that date, 18923 the alphabet continues.

Q. Oh, the same as that other case, you mean?

A. The same as the other case.

Q. The second sheet?

A. Yes, sir.

Q. All right.

A. Names a rate from Universal to Scottsville of 25 cents, 100 pounds.

The tariffs examined in the Interstate Commerce Commission indicate that although the rate book named a rate of 12½ cents, the rate actually was 25 cents.

Q. As of the same time?

A. As of that period of two months. The tariff naming the 25-cent rate on both dates was the same as that given for Asa.

Q. Now, showing you Commission's Exhibit 1110-R, being a rate book of the Institute for a number of New England States, effective July 1, 1935, and Commission's Exhibit 3026, being correction sheets to New England Freight Rate Book (indicating), I will ask you to give the results of your checking from the tariffs on file at the I.C.C., of the rate between Universal, Pa., and Colby, Maine.

A. I note that this sheet (referring to data)—that this book is not complete. Do you want me to testify from an incomplete book?

Q. I did not notice it myself. Which one?

18924 Well, do you find in it—

Mr. Leisure: Mr. Wooden, what was the first town that you mentioned?

Mr. Wooden: Universal, Pa.

Trial Examiner Norwood: Is it complete as to the rates for the destinations named in it?

The Witness: The rate book bears on the title page a note "See page 2 for emergency charges." Page 2 is missing, so I cannot state whether that correctly reports the emergency charges or not. I can state what it contains as to the balance of the rate.

By Mr. Wooden:

Q. Does it contain the rate from Universal, Pa., to Colby, Maine?

A. The rate book on page 11 showed the rate of 48½ cents from Universal to Colby, Maine.

Mr. Leisure: 38½?

The Witness: 48½.

By Mr. Wooden:

Q. 48½. Effective when?

A. Effective July 1, 1935.

(Referring to data): In the Commission's Exhibit No. 3026-ZZ, the rate is shown as 50½ cents.

Q. Effective when?

A. Issued November 20, 1937, and effective No-
18925 vember 15, 1937, or five days before it was issued.

The rate of 48½ cents shown in the rate book as having been in force on July 1, 1935, was verified. The rate of 50½ cents shown as effective November 15, 1937, was not verified.

We find that the rate on November 15, 1937, was 49½ cents. That rate was a combination rate made over Northern Maine Junction, Maine, using Maine Central, I.C.C. No. C-4455, page 11, Rule 5, and Aroostook Valley, I.C.C., page 3, index 17.

I should explain, in this connection, that the Aroostook Valley Tariff—generally all rates on cement were increased 1 cent on November 15, 1937, under authority of the Commission's order in Ex Parte 115, but, for some reason not material here, the Aroostook Valley failed to increase its tariff on that date and did not so increase the rate for some few days thereafter, I think about a month thereafter.

18926 Q. Does that explain this difference of one cent?
A. That explains this difference of one cent.
Q. In your opinion?
A. That would account for the difference of one cent, and, I assume, explains it.
Q. Now will you look at the same rate book and correction sheet, the exhibit, and give us the results of your checking with the official tariffs at the I. C. C. of the rate between Rockland, Maine, and Bristol, New Hampshire.
A. (Referring to data.) Effective July 1, 1935, the rate book shows a rate of 15 cents from Rockland, Maine, Bristol, New Hampshire.
Q. What was the effective date?
A. July 1, 1935.
Issued June 7, 1937, and effective at once, the Exhibit No. 3026-KK shows a rate from Rockland, Maine, to Bristol, New Hampshire, as 17 1/2 cents rather than 15 cents.
Maine Central, I. C. C. No. C-4483, Item 115, Station 323, named the rate of 15 cents during the entire period and it was not changed to 17 1/2 as alleged on that date.
Q. What do you mean by "as alleged"?
A. As alleged—as stated in the rate book, I should say—I mean in the correction sheet.
Q. You mean to say a correction was made where
18927 no correction was called for by the Interstate Commerce Commission?
A. The tariff was apparently not changed on that date. The 15 cents remained in force, as I have indicated.
At least, that is what my notes show.
Q. Now will you look at the same rate book and correction sheets and give us the results of your checking with the official tariffs on file at the I. C. C. of the rate between York, Pennsylvania, and Hampstead, New Hampshire.
A. (Referring to data) Effective July 1, 1935, the rate book shows a rate of 21 1/2 cents from York to Hampstead.
A sheet issued August 5, 1938, and this portion of it shown effective at once, named a rate—
Q. What Exhibit number?
A. 3026-TTTT—named a rate of 28.15 cents.
That was three years and one month after the rate book was issued.
We verified the rate of 21 1/2 cents as having been in force on July 1, 1935, and remaining in force until November 14, 1937.

The present rate is 24 cents.

Q. What do you mean by the present rate?

A. The rate in force today or in force the day I made this check, was about two weeks ago.

Q. What was the rate as of the date of the correction sheet, August 5, 1938?

18928 A. I said "present"; I should have said the rate on the date of the correction sheet, August 5, 1938.

The rate of 21 1/2 cents was named in Pennsylvania Railroad Tariff 1473-A, I. C. C. No. 152, supplement 29.

The B and M index No. 1395, rate 21 1/2 through November 14, 1937.

Effective November 15, 1937, and lasting through March 27, 1938, the rate was 22 1/2 cents; Pennsylvania Railroad Tariff No. 1473-A, I. C. C. No. 152, supplement 33, and Tariff No. 1473-B, I. C. C. 1622, page 126, index 188.

The rate of 28.15 cents may have been a typographical error for intending to say 21 1/2 cents; otherwise I can't account for the error of four cents in that rate; 4.15 cents.

18929 Q. Mr. Simpson, showing you Commission's Exhibit 1110-O, being the Institute Rate Book for Mississippi, effective November 26, 1935, and the correction sheets for Mississippi, being Commission's Exhibit 3023 (indicating); will you refer to them and then state the results of your checking of the official rates on file at the I. C. C. of the rates between Buffington, Ind., and Tyson, Miss.?

A. (Referring to data) The Mississippi Rate Book No. 3, effective November 26, 1935, subject to the emergency charges heretofore described, shows a rate effective November 26, 1935, of 27 1/2 cents.

The correction sheet thereto, Exhibit 3023-G, issued February 26, 1936, and effective at once, shows a rate of 25 cents.

There was on file in the Interstate Commerce Commission a tariff naming a rate of 25 cents throughout that period. The rate of 25 cents was named as the Bruce rate in Central Freight Association Tariff 449-C, and 449-D, Agent B. T. Jones' I. C. C. Nos. 2549 and 2905, pages 51 and 49, respectively; also Tariff 460, I. C. C. 2145, the Mississippi and Skuna Valley stations.

Q. Now, looking at the same exhibits, the rate
18930 book and correction sheets for Mississippi (indicating); what were the results of your checking

with the official rates on file at the I. C. C. of the rates between Mitchell, Ind., and Hopewell, Miss.?

A. (Referring to date) Mississipi Rate Book No. 3, effecti[illegible] November 26, 1935, shows a rate of 24 1/2 cents. The rate sheet—correction sheet, I should say, issued August 17, 1936, and shown as effective at once, bearing Commission's Exhibit No. 3023-W, names a rate of 26 1/2 cents.

There was on file in the Interstate Commerce Commission a tariff naming a rate of 26 1/2 cents during this period of nine or ten months. That tariff was the Jones' Tariff heretofore mentioned, being the Hopewell rate shown on pages 53 and 51, and also Tariff 460, I. C. C. No. 2145, station 58955.

Q. Now referring to the same exhibits, the rate book and correction sheets for Mississippi, state the results of your check with the official tariff of the file at the Interstate Commerce Commission of the rate between Mitchell, Ind., and Luce—L-u-c-e—Farms, Miss.

A. (Referring to data) The Mississippi Rate Book effective November 26, 1935, shows from Mitchell to Luce Farms a rate of 29 cents.

Commission's Exhibit No. 3023-W, issued August 17, 1936, and shown as effective at once, names a rate of 27 cents. That rate of 27 cents was named in a tariff 18931 in force at the files of the Interstate Commerce Commission throughout the period of nine or ten months, and was named in the portion of the tariffs heretofore mentioned as Lucedale, L-u-c-e-d-a-l-e, Miss., rate.

Q. Now, Mr. Simpson, have you made any check of the official tariffs on file at the Interstate Commerce Commission that showed the freight rates on cement in carloads in force on April 8, 1938, from El Paso, Texas, to certain stations in Arizona and New Mexico?

A. I did, sir.

Q. Will you state what the official tariffs show the rates were on that date from the points stated to the towns of Arntz, Bisbee—

Mr. Leisure: Is this—this is from where to where?

Mr. Wooden: All from El Paso.

By Mr. Wooden:

Q. (Continuing) —Clifton, Douglas, Holbrook, Lupton, and Miami, Ariz., to Lordsburg, N. M.,—all being from El Paso to those points?

Mr. Leisure: Could I get those names again?

The Witness: I will give them to you.

Mr. Leisure: First, may we have what you are reading from?

The Witness: This is a memorandum I prepared.

Mr. Leisure: Could we have it marked?

18932 Mr. Wooden, do you have any objection to having it marked?

Mr. Wooden: No.

(Thereupon, the document referred to was marked for identification as Commission's Exhibit 3049.)

A. Atchison, Topeka & Santa Fe, I. C. C. Nos. 12767, or Southern Pacific Railway I. C. C. Nos. 4661, as will be specifically designated in connection with each rate, named a rate in force—

Mr. Leisure: Just a moment, just a moment.

Do you have those original documents here in court?—

The Witness: No, sir.

Mr. Leisure: —from which you took that?

The Witness: No.

Mr. Leisure: Unless the original documents are here or unless the witness will produce them, I object to him reading this document.

Trial Examiner Norwood: This data was taken from the—

Mr. Leisure: Official rates.

Trial Examiner Norwood: —original on file at the Interstate Commerce Commission?

The Witness: Yes.

Trial Examiner Norwood: And you are reciting them plainly so that they may be examined by anyone?

18933 The Witness: Oh, yes, yes.

Trial Examiner Norwood: The objection is overruled.

A. This one, or the other, of the tariffs, named a rate on Portland cement in carloads in force on April 8, 1938, from El Paso, Texas, to Arntz, Ariz., of 34 cents, the Santa Fe tariff; Bisbee, Ariz., 34 cents, the Southern Pacific tariff, Clifton, Ariz., 30 cents, the Southern Pacific tariff; Douglas, Ariz., 28 cents, the same tariff; Holbrook, Ariz., 34 cents, the Santa Fe tariff; Lordsburg, N. M., 21 cents (referring to data)—

Mr. Leisure: How do you spell that: The Witness: L-o-r-d-s-b-u-r-g.

A. (Continuing) —Southern Pacific tariff.

I gave that rate 21 cents, I believe.

Lupton, Ariz., 34 cents, the Santa Fe tariff, and Miami, M-i-a-m-i, Ariz., 35 cents, the Southern Pacific tariff.

I made the statement that that applied on Portland cement; it applies on cement, Portland, natural, or hydrated, I believe.

Mr. Zimmerman: Not hydrated cement?

The Witness: Well, it is Portland, natural, or something else, I have forgotten; I have got the note here.

By Mr. Wooden:

18934 Q. Now, Mr. Simpson, have you made any examination of the official tariffs on file at the I. C. C., that show the rates on cement from Security, Md., and from Martinsburg, W. Va., the number of specified points which I will specify in a moment in North Carolina?

A. I have, sir.

Q. Will you state what the official tariffs show as to the rates on cement from Security, Md.?

Mr. Leisure: Security, did you say, Mr. Wooden?

Mr. Wooden: Yes.

A. Read the second column.

By Mr. Wooden:

Q. To Savage, N. C., Maysville, N. C., Siloam, Weldon, Eure.

Mr. Leisure: Is that North Carolina also?

Mr. Wooden: Yes.

By Mr. Wooden:

Q. And Columbia.

A. No, sir; not in all cases.

Q. You stopped at Weldon.

Well, did you make any check of the I. C. C. tariffs showing the rates from Security, Md., to Sunbury, Maysville, Lockport, and Weldon, N. C.?

A. I did, sir.

Q. Did you make that check for the rates as of February 1, 1936, and February 1, 1937?

18935 A. Yes, sir.

Mr. Leisure: Mr. Wooden, you said Sunbury—I thought you said Martinsburg. Is that a different name or have I got that wrong?

Mr. Wooden: No, I didn't mention—

Mr. Leisure: The first list you read I thought you said Martinsburg.

Mr. Wooden: It included both. I am separating them now. I will take up Martinsburg in a moment.

By Mr. Wooden:

Q. What were the rates as of the dates I mentioned, from Security, Md., to the towns that I have named?

A. (Referring to data) Agent Roy Pope's—

Mr. Leisure: Just a moment, Mr. Simpson.

Do you mind if we have the paper that he is reading from marked, Mr. Wooden?

Mr. Wooden: No.

Trial Examiner Norwood: You may mark it.

(The paper referred to was thereupon marked for identification as Commission's Exhibit 3050.)

Trial Examiner Norwood: Go ahead.

A. (Resumed) Agent Roy Pope's cement tariffs, I. C. C. 1626 and 105, showed the following rates—

Mr. Leisure: Without taking time, may we have the same objection to this exhibit as to the last?

18936 Trial Examiner Norwood: Yes.

Mr. Wooden: I have not offered it.

Mr. Leisure: I take it that you do not have the original of the official tariffs here, either?

The Witness: I have 1620 with me.

Mr. Leisure: I beg your pardon?

The Witness: I have one with me, and not the other.

Mr. Leisure: Which covers—

The Witness: It covers the February 1, 1936, rate.

Mr. Leisure: I see.

If Your Honor pleases, this does not seem to be in connection with rates. I think we should have an offer of proof as to what the connection is with the issues in the case. It is not apparent to me as to how this is material to any issue.

Trial Examiner Norwood: Showing the differences between the rate books and the official tariff.

Mr. Leisure: That is not what they are doing now. That is what they were doing.

Mr. Wooden: It is not what is involved here, Your Honor. It is simply in connection with the application of rates to certain destinations from certain shipping points.

Trial Examiner Norwood: Yes.

Mr. Wooden: And to be used, frankly, in ascertaining what the mill nets on such shipments would be.

Trial Examiner Norwood: Yes.

18937 Mr. Leisure: Some of these names are—for instance, Martinsburg, West Virginia, that is a non-respondent's location so that I don't see how that would be material in this case.

Trial Examiner Norwood: Well, I think we might—

Mr. Wooden: Talking about—Security, Maryland, is what?

Trial Examiner Norwood: The objection is overruled. Go ahead.

The Witness: May I ask the Reporter to read what I said?

(Last partial answer read.)

A. (Continuing) —from Security, Maryland—I should say that the rate was the same on February 1, 1936, and on February 1, 1937, with the exception that on February 1, 1936, the rates were subject to an added emergency charge of 1 cent shown in Speiden's I. C. C. No. 35.

I will read the rates only once.

Security, Maryland, to Sunbury, North Carolina, using the Savage, North Carolina rate, 18½ cents.

Security, Maryland, to Maysville, North Carolina, using the Maysville, North Carolina, rate, 23 cents.

Security, Maryland, to Rockford, North Carolina, using the Siloam, North Carolina, rate, 18½ cents.

Security, Maryland, to Weldon, North Carolina, 18938 using the Weldon, North Carolina, rate, 16½ cents.

I should state that the use of those rates that I have mentioned is authorized in the tariff and is simply cited for the convenience of anyone checking the statement.

By Mr. Wooden:

Q. Did you also check the rates as of the same dates from Martinsburg, West Virginia, to Roduco, and Travis, North Carolina?

A. I did.

Q. What were the rates as of those dates shown by the official tariff?

Mr. Leisure: We make the same objection to that group of destinations.

Trial Examiner Norwood: Same ruling. You have your exception.

A. Agent W. S. Curlett's I.C.C. 481 names a rate to Eure, E-u-r-e, North Carolina, applicable to Roduco of 17½ cents plus the emergency charges, in 1936, and 17½ cents without the emergency charge, in 1937.

From Martinsburg to Travis the rate is the Columbia, North Carolina, rate and is 20½ cents on both dates with the added emergency charge of 1 cent in 1936.

In all cases any rates were stated in cents per 100 pounds.

18939 By Mr. Wooden:

Q. You made several references, Mr. Simpson, to the emergency charges on cement. Will you now give us a complete description of the nature of those charges and the history of them and their various changes over whatever period they were effective?

A. I made quite a study of the emergency charges and found that it could be briefed, and I have done so.

Mr. Leisure: Would you mind having it marked, Mr. Wooden?

Mr. Wooden: All right.

By Mr. Wooden:

Q. I want your testimony to be independent—I mean, with regard to Interstate rates.

A. Do you want me to limit it to cement?

Q. Yes. Of course, if it happens to apply to any other things, there is no objection to that, but I want it to be inclusive of cement, at any rate.

(Whereupon a certain paperwriting was marked Commission's Exhibit 3051-A, B, and C, for identification.)

By Mr. Wooden:

Q. You may refer to any notes or papers you have, including the papers that have just been numbered, but I wish you to make your testimony apart, without reading from it.

18940 Trial Examiner Norwood: Do not read from there.

Mr. Leisure: You understand the instructions from the Examiner you were not to read from that?

The Witness: Yes, but I have got to refer to this for dates, and I.C.C. numbers.

Trial Examiner Norwood: Go ahead.

A. The first date since 1900 that an emergency charge was added to rates was on January 4, 1932, when most of the tariffs, I should say all but a few of the tariffs, were made subject to an emergency charge named in the tariff of emergency charges which tariffs bore the I.C.C. numbers of numerous agents, one of which will be cited for the convenience of the Commission; that is Agent E. B. Boyd's I.C.C. No. A-2245.

This joint tariff provided that all rates in the tariff should be ascertained by first—should be computed by first ascertaining the line haul transportation charges; then adding to such charges an emergency charge—

18941 Mr. Leisure: Just a moment, Mr. Simpson.

I object to the witness reading from this exhibit unless and until it appears that the originals from which he took these exhibits are in the courtroom.

The Witness: They are.

Mr. Leisure: Are they all here?

The Witness: I have unofficial copies which are printed off the same plate at the same time as the official copies but are not the official copies.

Trial Examiner Norwood: What is that paper?

The Witness: I will show you.

(The witness hands a bound volume to the Examiner who examines same.)

Mr. Leisure: Are they originals from which your memorandum is made?

The Witness: Yes, sir.

Trial Examiner Norwood: These tariffs belong to the records of the Interstate Commerce Commission?

The Witness: Yes, they belong to the records of the Interstate Commerce Commission.

Mr. Leisure: They are all, do I understand, Your Honor, the originals from which this tabulation was made, Commission's Exhibit 3051-A, B, and C, for identification?

The Witness: Yes, sir.

18942 Trial Examiner Norwood: Go ahead.

The Witness: I can save a great deal of time if I am permitted to read.

This joint tariff—

Mr. McFadden: Mr. Witness, you have been instructed not to read.

Trial Examiner Norwood: I was just waiting to get Counsel's reaction as to the witness' statement there that he could save time by reading. I think he can.

Mr. Leisure: Could we mark the original tariffs he took them from, if he does that? We will have no objection to his reading, then.

Mr. Wooden: I don't want him to read it, myself.

Trial Examiner Norwood: I think you had better refresh your memory and put the paper aside and give your testimony independently.

A. (Continuing) The emergency charges which are generally—I should say, which were generally applicable in 1932, January 4, 1932, were 10 percent of the line-haul transportation charges but subject to certain maximum charges and in a few instances subject to specific charges in lieu of the 10 percent.

Item 540, I believe it was, of each of the tariffs that I have mentioned now, and will mention hereafter in this discussion, provided a maximum charge of 1 cent 18943 per hundred pounds on cement.

That meant, for all practical purposes, the increase on cement was 1 cent a hundred pounds, there being comparatively few hauls subject to a rate of less than 10 cents a hundred pounds. That rate remained in force in that tariff, and in a succeeding tariff, E. B. Boyd's I.C.C. No. A-2277, effective April 4, 1932, until September 30, 1933, at which time the emergency charges expired by limitation. They remained out of use for 15 months—18 months, I should say.

On April 28, 1935, a new emergency charge was established. This time all—

By Mr. Wooden:

Q. Was that April 28?

A. April 18, 1935.

This time the one-cent maximum which I mentioned before was continued but instead of being 10 per cent of the line haul charges it was only 7 per cent of the line haul charges.

Therefore, any rate of 14½ cents, if I remember correctly, or less, you would figure at 7 per cent of the line haul charges.

In excess of that amount you would figure one cent a hundred pounds.

That remained in force until December 31, 1936, when it expired by limitation and remained out until No-
18944 vember 15, 1937, at which time all rates on certain groups of low grade commodities—I mean low grade from the standpoint of cost; I am not referring to the quality of the goods in any way—were increased by certain specified or percentage amounts.

Cement was increased a flat one cent, again.

Those remained in force until March 27—through and including March 27, 1938.

March 28, 1938—

Trial Examiner Norwood: Now you are not doing what I told you. I don't want you to read from that paper.

The Witness: I am not reading.

Trial Examiner Norwood: Oh, I see.

A. (Continuing) —on March 28, 1938, the rates were increased under ex parte 123 of the Commission and that provided an increase—

By Mr. Wooden:

Q. Did you say 123?

A. 123, yes.

Q. Are you sure of that figure?

A. Yes, sir. The rates were increased 10 per cent by the Commission's order but the Commission's order required that the increase of November 15, 1937, be included in the 10 per cent.

18945 The practical effect of the increase of March 28, 1938, was to increase the November 14, 1937, rate by 10 per cent.

I should say that the rates in the first emergency period, that of 1932 and 1933, were in compliance or were authorized by the Commission in ex parte No. 103.

Those in the second emergency period and the November 15, 1937, increases, were authorized by two different orders in ex parte 115 and as indicated the 10 per cent increase was in response to an order in ex parte 123.

By Mr. Wooden:

Q. Mr. Simpson, I am showing you Exhibit 1110-A being the Alabama Rate Book of the Institute, November 12, 1935, and will ask you to tell us what rate is there shown between Nashville, Tennessee, and Sheffield, Alabama.

18946 A. (Referring to data) The Alabama Rate Book, effective November 12, 1935, shows a rate from Nashville to Sheffield of 12½ cents.

I note that this book shows the rate as published in tariffs on file with the Interstate Commerce Commission and the Alabama Public Service Commission. Of course, my testimony will be limited as to tariffs on file with the Interstate Commerce Commission.

Q. Have you checked the tariffs sufficiently on file at the I.C.C. to ascertain whether there was any other rate between Nashville and Sheffield, as of the time the rate book was effective?

A. I did, sir.

Q. Will you state what you found?

A. The rate of 12½ cents subject to a minimum weight of 50,000 pounds, and applicable over a large number of routes, was for general application; that produced a minimum charge of $62.50 a car.

There was, however, in force on that date a rate of 8 cents per hundred pounds subject to a minimum weight of 80,000 pounds, or a minimum charge of $64 a car, of somewhat restricted application, and if the Examiner will permit me to read that application I will be glad to give it.

Mr. Leisure: Have it marked, please.

Trial Examiner Norwood: Is that from the tariff?

18947 The Witness: That is from the tariff, and copied in this note I have here.

Mr. Leisure: Would you have it marked, please, first?

Trial Examiner Norwood: The tariff is marked.

Mr. Wooden: Let me see that.

The Witness: I have the tariff with me, I can read from the tariff, if you would rather.

Mr. Leisure: Perhaps that would save time if you did.

The Witness: The tariff cannot be introduced, though. It is an official copy.

Mr. Leisure: Will you have this marked, then?

Trial Examiner Norwood: How many sheets are there to be marked?

The Reporter: It consists of nine sheets.

Trial Examiner Norwood: It may be marked Commission's Exhibit 3052-A to I, inclusive.

(The document referred to was thereupon marked for identification as Commission's Exhibit 3052-A, B, C, D, E, F, G, H, and I.)

Trial Examiner Norwood: Now, as I understood, that paper is an exact copy of the official tariff?

The Witness: Yes.

Trial Examiner Norwood: You made it?

18948 The Witness: I made it.

Trial Examiner Norwood: Yes; all right.

Mr. Leisure: If Your Honor pleases, if the witness proposes reading it into the record, I object to it, unless and until it is marked. It does not seem to me—

Trial Examiner Norwood: It is marked.

Mr. Leisure: —that a record is complete.

Trial Examiner Norwood: It is marked.

Mr. Leisure: But it is not in evidence and it does not seem to me that a record is complete, or we have a proper record, if witnesses are allowed to take the witness stand and read at will from exhibits which are not in evidence, and I do not think that that practice should be continued.

Mr. Wooden: I do not want him to read it.

Trial Examiner Norwood: This is the official tariff.

Mr. Wooden: I do not want him to read it.

Trial Examiner Norwood: This is the official tariff that is on file with the Interstate Commerce Commission, and may be consulted, and here is a paper which this witness swears is an exact copy of it, and that is for the use of Respondents' Counsel if Counsel want to see it, and it is not desired to put all of this into evidence but only a few of the facts that are shown there, and I think

18949 it is a reasonable thing to do to let him go ahead with it as it is.

I shall overrule the objection and Counsel has his exception.

The Witness: Do you want me to read from the tariff, Mr. Wooden?

Mr. Wooden: Read—if you are going to read at all, but I prefer that you refer to the original basic data, wherever you have it, and testify from it.

The Witness: I will have to read it; I would not take the responsibility of quoting, otherwise.

Mr. Wooden: The Examiner has ruled that you may, as I understand it.

Trial Examiner Norwood: He may.

A. (Referring to data): The 12½-cent rate was subject to the following commodity description of cement: Hydraulic, natural, or Portland, carload, minimum weight

50,000 pounds, except when for carriage convenience a car of less capacity is furnished the minimum weight will be the marked capacity of the car, but not less than 40,000 pounds.

By Mr. Wooden:

Q. Is there any— Are you through?

A. No, sir.

(Continuing): Supplement 40 to I.C.C., that was read from Speiden's 341-A, I.C.C. 1626, the same rule
18950 applied in the succeeding tariff, I.C.C. 105 of Agent Pope.

Supplement 42, I.C.C. 1626, which published the 8-cent rate in force in November, 1935.

I believe that was the date you wanted.

Mr. Leisure: Just a moment, Mr. Simpson.

I am not sure, Your Honor, whether my objection covers this group of testimony, or not, but I would like to have it do so, and I object to this line of testimony as incompetent, irrelevant, and immaterial, there being no showing that it is relevant to any of the issues in the case.

Trial Examiner Norwood: Overruled.

18951 Trial Examiner Norwood: Go ahead. On the record.

Mr. Wooden: Continue, Mr. Simpson, with your answer.

A. (Referring to data): The rate of 12½ cents subject to the commodity described, which I have read a moment ago, was stated in Supplement 40 subject to a reference mark encireled four—which is explained will not apply on traffic destined to points on Tennessee River between Florence and Decatur, Ala. (not inclusive), and between Florence, Ala., and Perryville, Tenn. (not inclusive); on January 1, 1936, there was published between the same points as from Nashville to Sheffield a rate of 8 cents, both of which rates were in force on November 15, 1935.

By Mr. Wooden:

Q. How long did the 8-cent rate remain in force?

A. It was in force for about a year, including that date. I did not check it beyond that period; that is, beyond the year. It was in force until November 16, 1936. I do not know how much beyond that period.

Q. Does the Arizona Rate Book of the Institute make any reference to the 12½-cent rate being on a certain minimum weight car?

A. No, sir; nor does it make any exception as to the application on traffic destined beyond.

The 8-cent rate was subject to certain restric-
18952 tions. Do you want me to read them?

Q. All right.

Mr. Leisure: Mr. Wooden, did you fix the date of the Alabama Rate Book?

Mr. Wooden: I think so.

The Witness: It is November 12, 1935.

A. (Continuing) The first of these exceptions against the 8-cent rate is in circle 5 explained, expires with December 31, 1935, unless sooner canceled, changed, or extended.

The next reference is subject to item 50 as to intermediate points of origin. Now that item 50 provides that from unnamed origins the rate will be the same as from named origins.

The next reference is small case "k," explained—rates bearing this reference apply on cement, hydraulic, natural, or Portland, in bulk, carload minimum weight 80,000 pounds, except when for carriage convenience a car of less capacity is furnished, the minimum weight will be the marked capacity of the car, but not less than 50,000 pounds.

The next reference is letter "m," small letter "m," which is explained: Applicable only on shipment moving by commercial bills of lading to points on the Tennessee River between Florence, Ala., and Decatur, Ala. (not inclusive), and between Florence, Ala., and Perryville, Tenn. (not inclusive).

(Rates do not include cost of transfer necessary
18953 to make delivery to barge at Florence or Sheffield, Ala.)

The last reference is "P," explained: Applicable only via L. & N. direct, or via L. & N. Decatur, Ala., and Southern, and Bureau reference to the Southern Freight Association not material here.

By Mr. Wooden:

Q. Can you say, Mr. Simpson, whether or not the 8-cent rate that you have testified about also applied to other destinations than Sheffield?

A. I made a study of the rates from various points to Sheffield and to Florence.

I found about eight points from which rates were named

to Sheffield, where you had the two rates. In several cases, I think four cases, you had rates of 12½ and 8 cents; in other cases you had 13 and 8½, and one or two cases the rates were higher; but this was about the same spread.

Also, a few points,—not so many, I believe,—had the alternation of rates to Florence.

Mr. Wooden: Will you mark these papers for identification,—there are two sets.

Trial Examiner Norwood: They may be marked.

(The documents referred to were thereupon marked for identification as Commission's Exhibits 3053-A, 3053-B, 3054-A, 3054-B, 3054-C, 3054-D, and 3054-E.)

18954 By Mr. Wooden:

Q. Will you tell us what the papers marked for identification as Commission's Exhibits 3053-A and B, and 3054-A to E, inclusive, are, Mr. Simpson (presenting papers to witness)?

A. 3053-A is a copy of the Elgin, Joliet, and Eastern Railway Company tariff, freight tariff, No. 46-R, I. C. C. No. 2194. It names certain switching rates, or joint rates, not exactly termed switching rates, although they are very similar to switching rates,—between points in the Chicago switching area.

It is certified by the Secretary of the Interstate Commerce Commission as having been in force, and the supplements heretofore attached, on February 16, 1939.

The other schedule, which is Commission's Exhibit 3054-A to E, is a copy of Agent R. A. Sperry's I. C. C. 377, the Chicago Switching Committee Tariff No. 22-AA, issued by the Illinois Freight Association Tariff Bureau, and named industries, in the Chicago area.

Q. Are these tariffs that you have identified, are they certified?

A. They are certified by the Secretary of the Interstate Commerce Commission as being correct, exact, copies of tariffs on file with that Commission.

Mr. Wooden: I will offer those, Your Honor (handing documents to Mr. Leisure).

18955 Mr. Leisure: If your Honor pleases, could we have some offer of proof as to what these official rates have to do with the issues in the case?

Trial Examiner Norwood: I think it comes under the—

Mr. Leisure: If it is shown that they have any relation to the case, I will not object to them.

Trial Examiner Norwood: I think it comes under the offer that Mr. Wooden made this morning.

Mr. Leisure: I do not know; I do not recall what it was.

Trial Examiner Norwood: During the examination of this witness there.

Mr. Wooden: Your Honor will recall that in Chicago we had some testimony about how the Chicago delivered prices were made up.

Trial Examiner Norwood: Yes.

Mr. Wooden: Through the application of certain arbitraries.

These freight tariffs will aid in analyzing the nature of those arbitraries.

Trial Examiner Norwood: Was there an objection?

Mr. Brick: Yes.

Mr. Leisure: Let me understand, Mr. Wooden—the arbitraries you have indicated at Chicago or where?

Mr. Wooden: In Chicago.

18956 Mr. Leisure: In Chicago?

Mr. Wooden: Yes.

Mr. Leisure: And this bears on that subject?

Mr. Wooden: Yes.

Mr. Leisure: I have no objection.

(COM. EXS. 3053-A, 3053-B, 3054-A, 3054-B, 3054-C, 3054-D, and 3054-E were offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Simpson, have you made any examination or study of the tariffs on file at the I. C. C. with reference to the subject of the short-line haul from Mildred, Kansas, to various points in Iowa, through Des Moines?

A. Yes, sir.

Q. Can you testify as to what the facts are regarding the short-line routes between Mildred, Kansas, through Des Moines, to Perry, Adel, Guthrie Center, and Dallas Center, Iowa?

A. Yes, sir.

Q. All right, will you do so.

A. (Referring to data): Agent Kipp's I. C. C. No. 2958, in force on February 1, 1939, named rates on cement from Mildred, Kansas, to the four points mentioned by Mr. Wooden.

Mr. Leisure: Would you mind having the paper
18957 marked that you are reading from, please, Mr. Simpson?

The Witness: I can have one marked, but I cannot have this one marked because it is an official copy of the Commission, and I am going to read from this in a moment.

Mr. Leisure: Will you mark this, please.

Trial Examiner Norwood: It may be marked for identification.

(The document referred to was thereupon marked for identification as Commission's Exhibit 3055-A and 3055-B.)

18958 By Mr. Wooden:

Q. I have no objection, Mr. Simpson, to your referring to the exhibit marked for identification 3055-A and B, and refreshing your recollection in any way you can from it.

I want your testimony to be given as distinguished from reading from the paper.

A. Rates from Mildred, Iowa, to Perry, Iowa, Dallas Center, Iowa, Guthrie, Iowa, Adel, Iowa; each of those rates were subject to certain routing restrictions named—

A. Each of these rates is applicable over a num-
18959 ber of routes or applicable over one or more routes, all of which—some of which applied through Des Moines in each case.

In each instance there was a route through Des Moines over which the lowest rate would apply from Mildred to each of these four destinations I have mentioned.

18961 Q. Mr. Simpson, I believe you were testifying when we recessed concerning the short-line routes between Mildred, Kansas, and certain Iowa points through Des Moines.

A. Yes.

Q. Have you finished with your statement on that?

A. I will ask if the Reporter can read my last answer. Is it here?

(The witness refers to official record.)

The transcript shows that I completed my testimony on Mildred.

Q. Well, now, can you give us similar information as

to short-line routes from Humboldt, Kansas, to Adel and Arcadia, Iowa?

18962 A. Both those points have rates named in Kipp's I. C. C. A-2958, and those rates are subject to certain routes including movement through Des Moines in both cases.

Q. Can you state what the facts are regarding the short line, or reasonably direct routes from Bonner Springs, Kansas, to Perry, Iowa?

A. From Bonner Springs, Kansas, to Perry, Iowa, the shortest route over which the rate would apply on February 1, 1939, and that rate—those routes have been in existence for a number of years—was 200.

You say Bonner Springs to Perry?

Q. Bonner Springs, Kansas, to Perry, Iowa.

A. The shortest distance was 270 miles. The rate of 16 cents was good over various routes (referring to data).

18965 A. The rate of 16 cents in Kipp's I. C. C. A-2958 was, I am sure, over a large number of routes ranging in length from 270 to 363 miles, I see here; perhaps longer than that.

The shortest route which I was able to find were by Atchison, Topeka & Santa Fe, Bonner Springs to Kansas City; Chicago, Great Western, Kansas City to Des Moines, Minneapolis and St. Louis.

From Des Moines to Perry, distance, 270 miles.

Mr. Wooden, do you want me to put in the tariff references and distance tables?

By Mr. Wooden:

Q. Yes.

A. Atchison, Topeka & Santa Fe, I. C. C. No. 12714. Chicago, Great Western, 525, Minneapolis to St. Louis, B-820. The same distance was named via the route of the Union Pacific from Bonner Springs, Kansas, to Kansas City, Mo.

Chicago, Great Western, Kansas City to Des Moines and Minneapolis and St. Louis from Des Moines to Perry; Union Pacific Tariff 3936; Chicago, Great Western, 5255, Minneapolis, St. Louis B-820.

Q. What was that last shipping point?

A. Bonner Springs to Perry; moved through Des

Moines. A distance of 271 miles was named over at
18966 least two routes, they being Atchison, Topeka &
Santa Fe from Bonner Springs to Kansas City;
Chicago, Great Western from Kansas City to Des Moines;
Des Moines & Central Iowa from Des Moines to Perry.
The tariff by Atchison, Topeka & Santa Fe, 12714; Chicago, Great Western, 5255, and Interurban I. C. C. 33.

The same distance was named via Union Pacific from Bonner Springs to Kansas City; Chicago, Great Western, Kansas City to Des Moines; Des Moines & Central Iowa from Des Moines to Perry, the tariff being Union Pacific 3976; Chicago, Great Western 5255, and Interurban 33.

There was also another reasonably short route of 272 miles via Kansas City, Kaw Valley and Western from Bonner Springs, Kansas, to Kansas City, Mo.; Chicago, Great Western from Kansas City to Des Moines, and Minneapolis and St. Louis from Des Moines to Perry.

18968 Q. Mr. Simpson, what do the tariffs on file at the I.C.C. show with reference to the short line or reasonably direct route from Bonner Springs, Kansas, to Luther, Iowa?

Mr. Leisure: Just a moment, I am not sure just how the record stands. We made an objection. I do not know whether there was a ruling on it or not when we finished.

Trial Examiner Norwood: This paper that he is using, that is marked Commission's Exhibit 3056-A to U, for identification.

Mr. Leisure: What is it? I do not know what it is yet.

Trial Examiner Norwood: He has already described it there. He can tell us again.

The Witness: It is a file of the Interstate Commerce Commission consisting of carbon copies which I prepared showing the rates from certain points in Kansas City, Mo., Illinois, to certain points in Iowa, and the distances and routes over which those rates would apply. The original of this letter was mailed to the Chief Counsel of the
18969 Federal Trade Commission, and I have no doubt that that copy can be substituted for this copy.

A. From Sugar Creek, Mo.—

18070 By Mr. Wooden:

Q. No, Bonner Springs, Kansas, to Luther, Iowa.

A. Oh, from Bonner Springs to Luther.

Agent Kipp's I.C.C. A-2958 named a rate of 15 cents per hundred pounds on cement from Sugar Creek, Missouri, to Luther, Iowa.

Q. Sugar Creek? Bonner Springs, I am asking you about.

A. Oh, I beg your pardon.

Q. I did intend to ask you about Sugar Creek later.

A. Bonner Springs, Kansas, to Luther, Iowa, is that correct?

Q. That is right.

A. The rate is named in I.C.C. A-2958 as 15 cents per hundred pounds, and is shown over a dozen odd routes.

Mr. Leisure: Did you give the date on that?

The Witness: The rate was in force February 1, 1939.

I might state that all these rates which I have been quoting have been in force except as adjusted under Dockets ex parte 103, 115, and 123, for many years.

The routes and distances had not been changed materially in that time. I don't think any of these routes and distances have chagned for many years.

The shortest line I found was 270 miles; the 18971 longest line 366 miles.

The short line route was via Atchison, Topeka & Santa Fe from Bonner Springs, Kansas, to Kansas City, Missouri; Chicago Great Western from Kansas City, Missouri, to Des Moines, Iowa; via Chicago, Milwaukee, St. Paul & Pacific from Des Moines to Luther, Iowa, a total of 270 miles.

Tariffs: Atchison, Topeka & Santa Fe 12714; Chicago Great Western 5255 and Chicago, Milwaukee, St. Paul & Pacific I.C.C. B-6113.

The same rate applied via another route for the same haul, 270 miles: Union Pacific from Bonner Springs to Kansas City; Chicago Great Western from Kansas City to Des Moines; Chicago, Milwaukee, St. Paul & Pacific from Des Moines to Luther.

Tariffs: Union Pacific 3976; Chicago Great Western 5255; Chicago, Milwaukee, St. Paul & Pacific B-6113.

There was another route only two miles longer. Kansas Kaw Valley and Western from Bonner Springs to Kansas City; Chicago Great Western from Kansas City to Des Moines; Chicago, Milwaukee, St. Paul & Pacific from Des Moines to Luther, a total of 272 miles.

The tariffs: Kansas City Kaw Valley & Western I.C.C.

9; Chicago Great Western 5255; Chicago, Milwau-
18972 kee, St. Paul & Pacific, B-6113.

Q. What do the tariffs via I.C.C. show according to the short line on reasonably direct routes from Sugar Creek to Perry, Iowa?

A. The rate named in Kipp's I.C.C. A-2958 is 16 cents. That is applicable under certain named routes varying in length from 261 to 365 miles in length.

The shortest route is via Atchison, Topeka & Santa Fe from Sugar Creek, Missouri, to Kansas City, Missouri; Chicago Great Western from Kansas City, Missouri, to Des Moines, Iowa; Minneapolis, St. Louis, from Des Moines, Iowa, to Perry, Iowa, a total of 261.

Tariffs: Atchison, Topeka & Santa Fe 12714; Chicago Great Western 5255; Minneapolis & St. Louis B-820.

18973 Q. What do you—

A. Now, there are three other routes. Do you want them? Short routes?

Q. All right.

Have you given, then, the short route?

A. That was the short route, 261 miles.

There was a route one mile longer, Kansas City Southern from Sugar Creek-Kansas City; Chicago, Great Western from Kansas City to Des Moines, Minneapolis & St. Louis from Des Moines to Perry, total 262 miles.

Tariffs, Kansas City Southern, 4656; Chicago, Great Western, 5255; Minneapolis & St. Louis, B-820.

Q. You may confine yourself to the short routes when you have a number, Mr. Simpson.

A. All right, sir.

Q. What do the tariffs on file at the I.C.C. show with regard to the short line route from Sugar Creek to Luther, Iowa?

A. The rate from Sugar Creek to Luther is 15 cents, shown on I.C.C. 2958, still on February 1,—they were all checked as of that date. The rate applied over various routes from distances ranging from 261 to 463 miles in length, the shortest route being Atchison, Topeka & Santa Fe from Sugar Creek to Kansas City; Chicago, Great Western from Kansas City to Des Moines; Chicago, Milwaukee, St. Paul & Pacific from Des Moines to Luther; distance, 261 miles. Tariff, Atchison, Topeka &
18974 Santa Fe, I.C.C. 12714; Chicago, Great Western, 5255; Chicago, Milwaukee, St. Paul & Pacific, B 6113 (referring to data).

Q. What do the tariffs on file at the I.C.C. show with reference to the short-line route between LaSalle, Ill., and Perry, Iowa?

A. The rate named in Kipp's I.C.C. A-2958, as 17 cents per hundred pounds. It applied over various routes ranging in distance from 263 to 396 miles.

The shortest route was via Chicago, Rock Island & Pacific from LaSalle to Des Moines; Minneapolis & St. Louis from Des Moines to Perry, a distance of 263 miles.

Tariff, Chicago, Rock Island & Pacific C-11924; Minneapolis & St. Louis, I.C.C. B-820 (referring to data).

Q. What do the tariffs on file at the I.C.C. show with reference to the short-line route between LaSalle, Ill., and Dallas Center, Iowa?

A. (Referring to data): The rate is 17 cents, applied over four routes ranging from 250 to 423 miles in length.

The short route of 250 miles is named the Rock Island—Chicago, Rock Island & Pacific from LaSalle, Ill., to Des Moines, Iowa; Minneapolis & St. Louis from Des Moines to Dallas Center. The tariffs are Chicago, Rock Island & Pacific I.C.C. 11924; Minneapolis & St. Louis I.C.C. B-820.

Q. Does that route apply through Davenport?

A. I will have to look at the Atlas, which I have 18975 with me, before I can tell you definitely.

Q. Will you do so?

A. (Referring to data) Yes, sir; according to this Rand-McNally, they would apply through Davenport.

Q. Did I ask you to state the short-line route between Humboldt, Kansas, and Adel and Arcadia, Iowa?

A. Yes, sir.

Q. I thought I did.

A. No, sir; you did not ask me the short-line distance. You asked me if the rates applied through Des Moines, and I told you they did. I did not check the distances on that.

Q. You mean that you cannot give the short-line route between Humboldt and those two Iowa points?

A. No, sir; I haven't got them with me. I could easily get them if they are wanted, but I haven't got them with me.

Q. Referring to the tariffs covering the Chicago Switching District—

A. Yes, sir.

Q. —Commission's Exhibits 3053-A and B, and 3054-A to E, inclusive.

A. Yes.

Q. I believe you gave the dates of those as February 1, 1939; is that correct?

A. The Exhibit 3053-B was certified by Secretary Bartell of the Interstate Commerce Commission as being
18976 true copies in force on February 16, 1939.

The Commission's Exhibit 3054-A, being the Speidel tariff, was certified as being in force on March 23, 1939.

Q. What can you say—what do you know with reference to any changes that have taken place in those tariffs for some time prior to February, 1939?

A. Elgin, Joliet & Eastern Railway Company, freight tariff No. 46-R, I.C.C. No. 2194, filed as Exhibit 3053-A, was originally issued to become effective June 20, 1934. At that time they classified the industries by the railroad on which they were located. Those located on railroads having a direct connection with the Elgin, Joliet & Eastern, and so shown in the tariff, or in the list of industries issued by Speidel, on our file, Commission's Exhibit 3954, took a switching charge of 3½ cents per hundred pounds.

I am using that term "switching charge" rather loosely. It is not clear whether it was a switching charge or line-haul charge.

Industries located on roads having an indirect connection with the Elgin, Joliet & Eastern, and so shown in the tariff, had a switching charge, or a line-haul charge, as you would care to call it, of 4 cents per hundred pounds.

On March 28, 1938, as a result of the permission granted in the order, in the Interstate Commerce Commission
Docket Ex Parte 123, the rate of 3½ cents was in-
18977 creased to 3¾ cents per hundred pounds, while the rate of 4 cents was increased to 4½ cents per hundred pounds. Those rates that I have mentioned were in force throughout the period from 1934 to date, except as reflected by the tariff of emergency charges in force—I do not remember—I think the emergency charge was still in force at the time it was issued, and the later emergency charge— No, no, at the time issued, but the railroad emergency charge did affect the rates by the addition of 7 percent of the—or 10 percent of the line-haul charges.

I will have to refer to the tariff. I have the tariff right here (referring to book).

Mr. Wooden: Will you number these, please?

(Thereupon, documents were marked for identification

as Commission's Exhibits 3057-A, 3057-B, 3058-A, 3058-B, 3058-C, 3058-D, 3058-E, and 3058-F.)

The Witness: Seven percent, an increase of seven percent of the transportation charges was made during the period previously indicated in my testimony from the life of the second emergency charges.

Trial Examiner Norwood: Is that the same character of documents as the others (having reference to the exhibits just marked for identification, Commission's Exhibits 3057-A and B, and 3058-A to F)?

The Witness: Yes, sir.

Trial Examiner Norwood: What are they?

18978 The Witness: They were the copies of the tariff about which I just testified.

Trial Examiner Norwood: Yes.

The Witness: Being certified as in force on a particular date. I testified as to the rates in force during the life of the tariff, including certain supplements not shown here.

Trial Examiner Norwood: Yes.

(Thereupon, documents were marked for identification as Commission's Exhibits 3059-A, 3059-B, 3060-A, 3060-B, 3061-A, B, C, D, E, F, G, H, I, and J.)

18979 By Mr. Wooden:

Q. By Simpson, I am showing you a collection of papers marked for identification as 3057-A and B, 3058-A, B, C, D, E, F, 3059-A and B, 3060-A and B, 3061-A to J, inclusive.

Will you tell us what those papers so marked are?

A. Taking 3057-A, it is a certificate of the Secretary of the Interstate Commerce Commission that the Commission's Exhibit 3057-B, together with certain papers attached thereto but not numbered, are the true copy of Pacific Freight Tariff Bureau, tariff No. 11-M, I. C. C. 1283, as modified by supplement Nos. 35, 29, 25, 19, 10 and 5 and attached thereto, but, as I state, not numbered.

This tariff names rates on classes between certain points in Arizona and points in California and other points.

Q. And what are the others; the other numbered papers?

A. Commission's Exhibit 3058-A is a certificate of the Secretary of the Interstate Commerce Commission that the copy of Elgin, Joliet and Eastern Railway Company, I. C. C. 2129 as modified by supplement 22, 29, 31, 32, and

33 attached thereto are true copies of the tariffs on file with the Interstate Commerce Commission.

This tariff and the supplements name rates from Buffington, Indiana, to various points in the Central Freight Association territory more specifically described in the tariff.

18980 Commission's Exhibit 3059-A under the seal of the Interstate Commerce Commission and the statement of the Secretary, properly signed, showing that Commission's Exhibit 3059-B which is attached and consisting of Pacific Freight Tariff Bureau tariff 88-P, Agent M. A. Cumming's I. C. C. No. 1250 as modified by supplement 12, 17, 19 and 27 are true copies of tariffs lawfully on file with the Interstate Commerce Commission.

I might state that each of those certificates that I have read so far bears the date which appears on the certificate as to which it is certified being in force.

Commission's Exhibit 3060-A is a certificate from the—I am sorry, that cannot be introduced, Mr. Wooden (handing document to Mr. Wooden).

Q. What is this?

A. It is not signed.

Q. Go ahead and tell us what it is, otherwise.

A. It is an unsigned certificate from the Interstate Commerce Commission stating that Atchison, Topeka & Santa Fe Railway Company, tariff No. 10254-J, Interstate Commerce Commission 12815 and modified by supplement 2 thereto is a true copy of the tariff on file with the Interstate Commerce Commission.

It names rates on cement, hydraulic, natural or portland, from El Paso to stations in the southwest more

18981 specifically named therein.

Commission's Exhibit 3061-A is a statement that —properly signed, I should say—that the 324 pages and four supplements to the tariff are true copies of Southern Pacific Company freight tariff No. 160-G, I. C. C. No. 4661 as on file with the Interstate Commerce Commission.

Mr. Wooden: Your Honor, I will offer all these documents which the witness has identified, including 3060-A which, inadvertently fails to carry the signature of the Secretary of the Interstate Commerce Commission, and I will provide that if Counsel insist on it, as a part of the identification, but I assume they will not insist upon that particular thing.

18983 (COM. EXS. 3057-A, 3057-B, 3058-A, 3058-B,
18984 3058-C, 3058-D, 3058-E, 3058-F, 3059-A, 3059-B, 3060-A, 3060-B, 3061-A, 3061-B, 3061-C, 3061-D, 3061-E, 3061-F, 3061-G, 3061-H, 3061-I, and 3061-J, were offered and received in evidence.)

18993 D. S. BROWDER was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

18994 *Direct Examination by Mr. MacIntyre.*

Q. Mr. Browder, I believe you testified in this case heretofore and have stated that you are a traffic manager of the Pennsylvania-Dixie Cement Corporation?

18995 A. That is correct.

Q. How long have you held that position?

A. Since February, 1931.

Q. During the period of time that you have served as traffic manager of the Pennsylvania-Dixie Cement Corporation, has Mr. Blaine S. Smith served as president of that corporation?

A. Yes, sir; he was president.

Q. During what period of time did he serve as president while you were serving as traffic manager?

A. He was president of the company when I came with them, and I don't recall the exact date he left the Penn-Dixie, but I think it was about in 1936.

Q. During 1936?

18996 A. I think, I am not sure of that; that is just a guess on my part. It is about two or two and a half years ago.

Q. We are to therefore understand from you that he served as president from 1931 to 1936, while you during that time were also serving as traffic manager?

A. To my belief, he was there until some time in 1936. I have forgotten the exact date, as I said, but I think it was 1936.

Q. Well, during that period from 1931 to 1936, both of you served as officials of that company?

A. Oh, yes.

Q. Is that correct?

A. Yes, I was traffic manager and he was president.

"Q. Mr. Browder, I am showing you document marked as Commission's Exhibits 562-B and C (indicating), and ask you to state whether or not you recognize the
18897 signature appearing at the bottom of the document marked 562-C.

A. (Examining document.) I do.

Q. In whose handwriting does that appear?"

The witness was permitted to answer the last question over objection made by Mr. Leisure and stated
18898 that he recognizes the signature appearing at the bottom of Com. Ex. 562-C. He can identify that signature (witness studies document) as his. He placed Mr. Blaine S. Smith's signature at the bottom of that letter, with the witness' initial underneath. The wit-
18899 witness can identify the handwriting in the signature appearing at the bottom of that letter, Com. Ex. 562, OOOOOOOOO, as Mr. Blaine S. Smith's signature; the witness can identify the handwriting in the signature appearing at the bottom of that letter, Com. Ex. 562,
19000 TTTTTTTTT and UUUUUUUUU, as Mr. Blaine S. Smith's signature; the witness can identify the handwriting in the sixnature appearing at the bottom of that letter, Com. Ex. 562, VVVVVVVVV, WWWWWWWWW and XXXXXXXXX, as Mr. Blaine S. Smith's signature; the witness can identify the handwriting in the signature appearing on that letter, Com. Ex. 562 12X, as Mr. Blaine S. Smith's signature; the witness can identify the handwriting in the signature appearing at the end of that letter, Com. Ex. 562, 15 B, 15 C,
19001 and 15 D, as Mr. Blaine S. Smith's signature; the witness can identify the handwriting in the signature appearing at the end of that letter, Com. Ex. 571 LL and NN, as Mr. Blaine S. Smith's signature; the witness can identify the handwriting in the signature appearing at the end of that letter, Com. Ex. 571 AAA and
19002 BBB, as Mr. Blaine S. Smith's signature; the witness can identify the signature and initials appearing at the end of that letter, Com. Ex. 576 V, as Mr. Blaine S. Smith's; the witness can identify the handwriting in the signature appearing at the end of that letter, Com. Ex. 576 TT, as Mr. Blaine S. Smith's signature; the witness recognizes the handwriting and signature at the bottom of that letter, Com. Ex. 883 GG as his own handwriting. He placed Mr. Blaine S. Smith's name there in his

handwriting; the witness wrote the letter and signed it.

19003 Q. What authority did you have to sign Mr. Smith's name to letters you wrote when you were traffic manager of the Pennsylvania-Dixie Cement Corporation and he was president, Mr. Browder?

A. On these particular letters—

Mr. Zimmerman: Well, I object to the question just as a matter of keeping Counsel straight.

I do not believe that you can prove the authority of the agent by the agent himself.

Mr. MacIntyre: I submit that you can.

If Mr. Smith told him that he had the authority, he can state whether or not Mr. Smith told him that he had the authority.

Trial Examinerd Norwood: He can tell us what he knows about it.

Mr. MacIntyre: Exactly.

Trial Examiner Norwood: The objection is overruled.

By Mr. MacIntyre:

Q. Would you please answer the question, Mr. Browder?

A. These letters were written with Mr. Smith's permission to do this.

Q. That is all. Thank you.

The witness recognizes the handwriting and the
19004 signature at the end of that letter (witness examines documents), Com. Exs. 883 HH and 883 ii; it is in the witness' own handwriting; he signed Mr. Blaine S. Smith's name to the letter with Mr. Smith's permission. The witness recognizes the handwriting which appears in the signature at the bottom of that letter, Com. Ex. 913 DD as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Exs. 925 SSSSS and 925 TTTTT, as
19005 Mr. Blaine S. Smith's. The witness recognized the handwriting which appears in the signature at the end of that letter, Com. Ex. 956 PPP, as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 958 QQ and RR as Mr. Blaine S. Smith's. The
19006 witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex.

958 WWWW, YYYY, ZZZZ, AAAAA and BBBBB as Mr. Blaine S. Smith's. The witness recognizes the handwriting and signature appearing at the end of that letter, Com. Ex. 958 FFFFF and GGGGG, as his own handwriting.

The witness placed Mr. Smith's name at the end of
19007 that letter in his handwriting with Mr. Smith's permission. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 958 MMMMM, as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 958 NNNNN as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 958 OOOOO, as Mr. Blaine S. Smith's.
19008 The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 958 PPPPP as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 971 15E,
19009 15F and 15G as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 971 21A, as Mr. Blaine S. Smith's. The witness recognizes the handwriting in which that document, Com. Ex. 971 25E, is written, as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 971 25F as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter,
19010 Com. Ex. 971 26R, as his own handwriting. The witness signed Mr. Blaine S. Smith's signature in his own handwriting with Mr. Smith's permission. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Exs. 971 27K, 971 27L, 971 27M and 971 27N as Mr. Blaine S. Smith's. The witness recognizes the handwriting which appears in the signature at the end of that letter, Com. Ex. 971 28T, as Mr. Blaine S. Smith's.

Mr. MacIntyre: That is all, Mr. Browder.

Trial Examiner Norwood: Cross-examine him.

Mr. Leisure: No questions.

19012 Mr. Wooden: Your Honor, may I inquire at this time whether a decision has been reached as yet regarding a recall of Mr. Royal.

Mr. Leisure: Yes, Mr. Wooden, we would like to have Mr. Royal.

Mr. Wooden: You want him?

Mr. Leisure: Yes. Can you tell us when, Mr. Wooden, he will be available so we will know how to plan in regard to him and Mr. Simpson and so forth?

Mr. Wooden: I can hardly tell, myself. Of course, it won't be before Tuesday or Wednesday, but we will have him here as soon as we can get him, I assure you.

I would like to inquire in regard to any objection on the part of Respondents to Exhibits 3041 to 3044, inclusive. They were mimeographed compilations of the freight rates put out by the Cement Institute Freight Rate Bureau in Chicago and I offered them, I believe subject to check at page 18878.

Mr. Leisure: If you give us copies of them—

Mr. Wooden: You have the papers themselves.

Mr. Leisure: We have to check them with Chicago
19013 and we haven't been able to check them, yet.

CARL GRIMMELMAN, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

19014 I am an importer of cement. I also deal in and sell both imported and domestic cement in the United States.

Q. To whom do you sell, Mr. Grimmelman; that is, what class of trade?

A. I sell to dealers.

Q. I didn't understand.

A. Dealers.

Q. To the dealer trade?

A. Yes.

Q. And how long have you handled domestic cement?

A. I have handled domestic cement beginning with—since January, 1934.

Q. In what localities are dealers located to whom you sell cement? That is, in what cities are they located, principally?

A. I only sell domestic cement in the metropolitan areas

of New York and imported cement at Atlantic and Gulf ports.

Q. And you also sell imported cement in New York as well as domestic?

A. New York, yes.

19025 Q. Mr. Grimmelman, will you please state what the price of cement in New York was,—that is, the price at which you sold your cement, imported cement, in New York, previous to June 1, in 1938,—say, May 1, 1938?

A. May 1, 1938?

Q. What was your price?

A. Bimco Trading, Inc., of which I am general manager, sold cement in New York at a price of $1.64 per barrel, f.o.b. truck, dock, less 10 cents per barrel discount for payment within 15 days, net 30.

Q. Is that in paper?

A. That was in paper bag package.

Q. At what price were you selling domestic cement in paper at that time, f.o.b. New York?

A. $1.85, less 10 cents, 15 days, $1.75 net.

Q. In paper?

A. In paper, yes.

Q. At what price were you selling domestic ce-

19026 ment in New York on August 1, 1938?

19027 A. I sold domestic cement in paper at—let us see—may I have a piece of paper?

(Witness figures on pad.)

$2.02 net.

Q. Is that in paper?

A. In paper, f.o.b. cars, New York.

Q. Did you allow a cash discount from that?

A. No, that is after deduction of cash discount. The price was $2.12 less cash discount, 10 cents per barrel, 15 days, or net 30.

Q. In other words, on a comparable basis with your May 1st price of $1.85, then, it is $2.12?

A. $2.12, that's right.

Q. What date did the price from $1.85 to $2.12,—what date did the change in that price take place, Mr. Grimmelman?

19029 A. That change took place, to the best of my recollection, about the middle of July.

By Mr. MacIntyre:

Q. 1938?

A. 1938.

Q. Will you state whether or not the price of the imported cement that you sold as of those dates, was changed by the same amount?

A. Bimco Trading, Inc., did not advance its price on imported cement until some time in October, 1938.

Q. How much did it increase it then?

A. The same amount, 27 cents per barrel.

Q. The same as the price of the domestic?

A. That's right.

19034 Washington, D. C.,
April 7, 1939.

19035 CARL W. J. GRIMMELMAN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. MacIntyre (Continued).

19042 Q. Was there a difference or differential in the price at which imported cement was sold and the price at which domestic cement was sold in the Miami market before you made the increase in price?

A. There was.

Q. How much was that?

A. Thirty cents per barrel.

Q. Was there a differential after the price was increased,—after the price increases was there still a differential?

A. There was.

Q. How much per barrel?

A. Thirty cents per barrel.

19044 Q. That is the same differential as now prevails in the Miami market?

A. That's correct.

Q. When did you begin handling the domestic cement, Mr. Grimmelman?

A. In January, 1934.

Q. You have handled it continuously since then?

A. Yes, sir.

Q. What brand or brands do you handle?

19045 A. I have handled the Pioneer brand.

Q. Do you know whether or not that during a period of the time that you have handled that brand that it was manufactured by the Allentown Portland Cement Company at its plant, or the plant of the Valley Forge Portland Cement Company?

A. Yes.

Q. That is, it is your—that is, you know it was manufactured at one of those plants for part of the time?

A. That's correct.

19046 Q. Well, now, since the date that you began handling domestic cement, and the date since this committee was formed, about which you testified yesterday, have you noticed any activities on the part of domestic manufacturers to boycott you in your sale of cement in the New York market, or any other market?

19047 A. While I have heard of a boycott in connection with hearings before various governmental bodies here in Washington, I may say that any so-called boycott that existed has never affected my firm, Bimco Trading, Inc.

19048 Q. Have you noticed any activities on the part of domestic manufacturers to boycott the dealers who handled the cement—to whom you sell?

A. No.

19050 *Cross-Examination by Mr. Leisure.*

19051 Q. I wanted to ask you whether or not during the time that the Allentown manufactured that, if that was before the National got under production?

A. Yes.

Q. And did it or did it not manufacture it after the National once got under production?

19052 A. I couldn't tell you. I believe they completed the contract for the amount of barrels—

Q. But other than that contract, they haven't manufactured since, so far as you know?

A. That is right; since then they have not.

Q. Mr. MacIntyre cited you a series of prices there as between domestic cement and foreign cement and I understood you to say in reply to one of his questions this morning that you meet competition wherever you find it with regard to these different prices.

I would like for you to tell the Examiner now whether at any time since you have been connected with importing cement there has ever been any sort of an agreement or understanding between yourself as an importer and any domestic manufacturers in any way whatsoever.

A. There never has.

19054 H. B. ROBESON, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am vice president in charge of sales of the Nazareth Cement Company.

Q. Do you sell standard cement in the metropolitan 19055 area of New York?

A. Yes, sir.

Q. Did the Nazareth Cement Company increase its price in the metropolitan district of New York some time last summer?

A. Yes, sir.

Q. From what to what price?

A. From $1.85 in paper, less 10 cents a barrel cash discount, to $2.12, less 10 cents a barrel cash discount.

Q. Did that increase have the effect of wiping out the arbitrary which had existed there before that and making the New York metropolitan price the equivalent of the Lehigh Valley base plus freight?

A. Subject to the correction of calculating, that would be my impression of it; yes, it would.

Q. Could you make the calculations in a moment or two, and, if so, go ahead.

A. I really can't, off hand, but my impression would be that is what it would work back to.

Q. What is the price in metropolitan New York today?

A. $2.12.

Q. And what is the base at Lehigh Valley?

A. $1.55 less 10.

Q. Is that difference accounted for by freight from Lehigh Valley to New York?

A. Yes, it would be, to the lowest point in town. I 19056 am quite sure it would.

Q. How much differential was there between

the foreign and domestic cement price in New York prior to the increase that you made last summer?

A. I wouldn't know exactly, Mr. Wooden. Some prices vary.

The only way we can get them is through our retail dealers, customers we might be trying to sell or selling and they tell us one thing or the other.

Q. Can't you approximate it some way or other?

A. I wouldn't want to take even a good running guess at it.

Q. Would it be as much as 20 or 25 cents a barrel?

A. It would be my impression about that. It would be considerable, anyhow.

Q. What did the amount of your increase for the domestic price for New York amount to, last summer?

A. 27 cents a barrel.

Q. Assuming that 20 cents was the differential before, you increased the differential by 27 cents more, would you say?

A. I don't follow you.

Q. Assuming that 20 cents was the differential before your increase, your increase resulted in the differential being increased by 27 cents, is that right?

A. You mean a differential between foreign cement and our brand?

19057 Q. Yes.

A. I don't know what their differential would be.

Q. I say, assuming it was.

A. As a matter of fact, I don't know what their price is today.

Q. Don't you know whether or not they immediately followed your increase in New York or whether there was some lapse of time for the increase in foreign cement?

A. Based on the report I had from our fieldman they did increase their price some time in the fall and yet we had all sorts of stories, again, maybe they did with this fellow and maybe they didn't.

19058 Q. What were the factors that led the Nazareth Company to increase its price in the metropolitan area last summer?

A. We had reports from our field men that there were new prices in the field, and at the same time that these prices were in the field in New York there were prices all over the North Atlantic Seaboard; simultaneously with

this advance in New York there were declines in our Pennsylvania territory, so that we had the whole picture coming in and, of course, we met the new price; in other words, automatically, we had to meet any declines, no question about it, or abandon the business.

Q. What change, if any, had taken place in the New York metropolitan area with regard to conditions
19059 of supply and demand there?

A. None that I could see.

Q. Mr. Robeson, I am showing you Commission's Exhibit 230-L—is that your communication (showing document to the witness)?

A. (Examines document) Yes, that's my initials.

Q. Yes, and in your handwriting?

A. Yes.

Q. What were the misunderstandings which you refer to in that communication as having existed in the past?

A. (Witness reads document) Well, first, we report our shipments—when I say "we" I mean Nazareth is my company—we report our shipments to three different places. We report them to the Bureau of Mines; we report them to the Cement Institute; we report them to the Portland Cement Association.

My own organization frequently would ask me whether we should include cement that was used for common use or whether we should include in our figure the cement that we had shipped for another manufacturer, or another manufacturer had shipped for us. There didn't seem to be any consistency, as I checked back with our detail staff, sometimes they did it one way and sometimes they did it another way.

There was another point involved with it, that Mr. Coffin had discussed with me, the question would arise,
19060 and arose in our own organization, if some other manufacturer shipped for us, or if we shipped for some other manufacturer, who would pay the dues. So then Mr. Coffin—as I remember the situation—Mr. Coffin asked me to apply my practical experience to the thing and give him some ideas as to the difficulties which did arise, and based on that Mr. Coffin then appointed the committee, and based on that they did design a new form—

Q. Mr. Coffin was then the president of the Institute, was he?

A. I am quite sure he was; yes, sir.

Q. Well, what was the nature of the misunderstandings that you refer to?

A. Well, just merely that the question would arise as to who was to pay the dues, and who was to report, and, consequently, there was a variance in figures between what the Bureau of Mines would show and what the Institute would show.

Q. Did you sometimes have a misunderstanding, when you saw the figures for other companies, as to just what the figures really represented with these factors in mind that you have named?

A. You mean the individual company?

Q. Yes.

A. No, not necessarily, I wouldn't know whether they were manufacturing their cement—

19061 Q. You say "not necessarily"; but wasn't there at times a doubt as to just whether the figures shown for your company, or for other companies, whether they included these types of shipments that you have referred to?

A. Well, there might be, yes. I could see, where if we were shipping for another manufacturer, and we reported it, and the other manufacturer also reported it, then you would have the two figures included twice—or have the figures included twice.

Q. (Showing document to witness) Showing you exhibit marked for identification as Commission's Exhibit No. 577-PP and QQ, do you recognize the signature to that?

A. (Examines document) Yes, that was Mr. Coffin's signature.

Q. Was he the head of your company?

A. Yes, he was—well, he was our—well, our working head; that is, he was the general manager of the company.

Q. Mr. Robeson, will you state whether or not in October, 1934, you received a duplicate of this letter, Commission's Exhibit 577-PP and QQ from Mr. Coffin (showing document to witness)?

Mr. Withrow: Off the record.

Mr. Wooden, what is the date of that letter?

Mr. Wooden: September 27, 1934.

A. (Examines document) Well, I don't recall it spe-

cifically, Mr. Wooden, but I notice Mr. Coffin said
19062 he was addressing one to me.

By Mr. Wooden:

Q. Yes.

A. So it is easy to suppose either one thing or another, he may have addressed one to me, or showed me the carbon copy.

Q. Did you provide the figures for the Nazareth Company that were asked for by Mr. Coffin from other companies?

A. I would hardly have to give him the Nazareth figures; he would probably know them as well as I did.

Q. Well, what did you do about it?

A. I don't recall anything particular. I rather take it that this was around the time that—well, I would say, yes, he says here that I was chairman of the original committee, the allocation, and so forth and so on, that he was—at that time the allocation problem was still on the table.

Q. Did you provide any figures for the Nazareth Company pursuant to this letter?

A. None that I can recall specifically, sir; no, sir.

Q. Did you ever see any of the figures for the other companies that Mr. Coffin asked for?

A. No, sir; I did not.

Q. Did you ever attend any meeting or conference following, or subsequent, to this letter of September 27, 1934, at which the subjects contained in that letter were discussed?

19063 A. Well, I wouldn't know, Mr. Wooden, whether this was prior to or after. I recall one meeting I went to in Chicago where we had the question of allocation before a major body, and—well, it was just decided to do nothing with it; in other words, it was not accepted.

Q. Was that along in March or April, 1934?

A. I am at a loss as to when it was.

Q. Was that the only meeting you ever remember attending on the subject?

A. Yes, sir.

Q. Do you recall whether or not after the Chicago meeting that you refer to that the same subject was submitted to the members in districts 1 and 2?

A. I wouldn't say that it was not, Mr. Wooden. Mr.

Coffin had that in his mind, and I am at a loss as to whether there was any definite action taken. I wouldn't say it wasn't proposed, but I am at a loss as to whether any definite action was taken.

Q. Do you know what, if anything, districts 1 and 2 ever did regarding the matter?

A. Never did anything as far as I know. In other words, I never felt we were ever obligated in our shipments to even consider anybody else except our own problems.

Q. Has the Nazareth Cement Company ever been a party to any arrangement by which the shipments of the company would be allocated with any other com-
19064 panies?

A. No, sir.

Q. Do you know whether or not districts 1 or 2 ever formally decided against any plan or arrangement for allocated shipments?

A. No, sir; I don't know whether they ever did formally decide against or for.

Q. Wouldn't you have known it if there had been any?

A. I should think so; yes, sir.

Q. But you don't know?

A. I don't know.

Mr. Wooden: Your Honor, at this time I would like to offer Exhibit 577-PP and 577-QQ, and also 577-RR, the latter apparently being a file copy of the reply to 577-PP and 577-QQ.

Both of these documents were produced under subpoena duces tecum over a year ago from the files, I think, of the Giant Portland Cement Company (handing documents to Mr. Leisure).

19065 (COM. EXS. 577-PP, 577-QQ and 577-RR were offered and received in evidence.)

The witness recognizes Mr. Coffin's signature on Com. Ex. 577-KKKK; the witness recognizes Mr. Coffin's signature on Com. Ex. 415-373; (19066) Mr. Coffin's signature on Com. Ex. 500-C seems to be a facsimile; those are the witness' initials in his handwriting on Com. Ex. 551-A. The other handwriting notations and signatures on that paper appear to be in the witness' handwriting; it appears to be Mr. Coffin's signature on Com. Ex. 575-I; it appears to be Mr. Coffin's signature on Com. Ex. 576-HHHHH; the witness identified Com. Ex. 800-UU to XX,

inclusive, as a copy of a letter which he wrote; that appears to be Mr. Coffin's signature on Com. Ex. 954-HH.

19066 Mr. Wooden; Thank you.

19067 Nothing further, Mr. Robeson.

Trial Examiner Norwood: Examine him.

Mr. Leisure: That is all; thank you.

FREDERICK L. STONE was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Stone, do you recall the circumstances of the bids made by the Universal-Atlas Company on the so-called Colorado River project in Texas in February, 1936?

A. I don't recognize that date but I remember, in a general way, that we did make such a bid.

Q. Did that involve bids for some 365,000 barrels?

A. As I recall it, that was the quantity.

Q. Did you personally participate in the calculations or the considerations that led up to the filing of your bid in that case?

A. Yes, in a general way, but I have no specific recollection of that bid more than of other similar bids that we have made. It undoubtedly came to my attention.

19068 Q. You put a bid in on that project, did you not, which included an allowance off the bid price in the event that the Government made its shipments on its own bill-of-lading?

A. I am not sure that that was done in that particular bid. I do know that we had reason to believe that some award was made taking into consideration such an item as that, and we, as I recall it, did include such an offer in some bids that were made; whether it was that particular bid, or not, I don't recall.

Q. Do you recall the figure $1916 in connection with that bid?

A. I have a hazy recollection of some such thing as that in testimony earlier in this case; but whether that is the amount involved I am unable to say.

Q. Can you explain how you arrived at the figure which you offered to allow in consideration of the Government shipping on its own bill-of-lading?

19069 A. I do not remember definitely. I do have a —the indefinite recollection that our consideration of that particular item was in connection with action taken by the Government, either partially or wholly because of such an offer in some other bids.

By Mr. Wooden:

Q. You do not know how you went about determining the amount that should be allowed in consideration of that factor?

A. Only to the extent that I have described in my answer to the last previous question.

Q. Did you submit your bids including the allow-
19070 ance for that factor, on a per-barrel basis?

A. I don't remember that. That is, I have already stated I don't know that we made such an offer in this particular bid that you are referring to.

19071 Q. Mr. Stone, if it should appear from evidence in the record that each bidder made exactly the same allowance for the factor of the Government handling the shipments on its own bill-of-lading, how would you account for that?

A. As I have already stated, I don't even remember that we included such an offer in this particular bid ourselves; certainly, I don't remember anything about what others may have done.

I have stated, however, that in some bids, whether it be this one or another one, we used information that had come to us from our people who were handling the transaction on which to base our figuring in the case where we did make such an offer. As to the details of what that offer was, or how, or when we got the information, I don't recall, but I am quite sure that it came from our people who had handled the previous transaction and presumably they got it from the Government officials who made the award.

Q. Do you know whether it was on a per-barrel basis?

A. I don't remember that; no, sir.

Q. Were not all of your bids on a per-barrel basis?

A. Our prices were made on a per-barrel basis, and in some instances carried out as requested by the invitation to the full amount.

19072 Q. Did you, in that case, make the total allowance of some $1916,—did you start with that and

divide it on a barrel basis, or did you work it out on a barrel basis, first, and then find that the total allowance was $1916?

A. I have already stated I don't even know that we made such an offer in that particular bid; also, that the $1916 does not refresh my recollection as to the amount involved, and I don't know the details of the figuring on the bid on which we did use it.

19073 Q. Showing you Exhibit 2267-A, B, and C, does that aid you in answering the questions I have asked about the allowance for Government bill-of-lading (handing documents to the witness)?

A. I see nothing here that refreshes my memory as to how the item you speak of was—

Q. I note on Exhibit 2267-C the figure "$1936". Does that aid you in—

A. I hadn't noticed that but it means nothing to me unless I tried to connect it up with the stuff that is in the record earlier about which my recollection is not vivid.

Q. Referring to this Exhibit 2267-A, B, and C, there appears to have been two methods of calculation; one, the old method and the other the new method.

Can you say which one was used in the bid on that occasion?

A. I can't remember which method was used, now.

Of course, we have that information but I haven't it in my head.

Q. If the new method were not used, could you explain why it wasn't used, referring to a notation on 2267-B "not used in bid"?

19074 A. As I stated, I did not handle this, personally. I did not prepare these figures.

19075 It was a good long time ago and I don't remember the details in connection with the transaction.

What is described as old method or new method: those words were simply used by the person who wrote this up.

By Mr. Wooden:

Q. Mr. Scovel?

A. Mr. Scovel, I believe.

It might as well have been called method A or method B or method X or method Y.

Q. Well, if the new method figured out a lower price or lower cost delivered to the Government than the old

method, can you then say why the new method was not used?

19076 Trial Examiner Norwood: On the record.

Answer the question, if you can.

The Witness: Your Honor, I didn't handle this thing, personally, and—

Trial Examiner Norwood: Are you familiar with the method, those two methods?

The Witness: I don't know that I would call these "two methods".

I would say that in figuring—in preliminary figuring as to what price we would quote these calculations were gone through.

As to just what was in the mind of the person making the figures, I don't know, and since I didn't handle it, personally, I don't even remember which one was used except from the note which I see here which states that the so-called old method was used.

By Mr. Wooden:

Q. Can you say why the bid price is figured out in fractions of a cent instead of in even cents?

A. (Referring to documents.) The freight rate, apparently, has been carried out to the actual fractions in converting the rate per hundred into the rate per barrel.

Q. And that was a commercial freight rate, was it?

A. It so states, yes, sir.

19077 Q. Isn't that somewhat different from the usual practice followed when your company features delivered prices?

A. It is, yes, and I might add there that while I cannot state the time nor the transaction involved, we saw a bid by some competitive company quoting the Government using that method; thereafter, we saw some other companies using the same method, and we then made our bids in the same way so as to be on what we call a competitive basis.

Q. Can you describe any instances where that was done?

A. I just stated I don't recall offhand the exact instances, but I think that the first notice of it was a transaction in which our Birmingham office was concerned, and I think they called it to the attention of our Chicago office and asked if they might follow that plan in later bids that

they might submit, and authorization was given them to do that.

Q. You cannot identify it any more particularly than that?

A. Not out of my head at the moment.

Q. Well, hasn't it been the usual practice of the Universal-Atlas Company in bidding, in figuring destination prices, on Federal Government purchases, to use the same form of calculating freight rates in even cents, as it uses on commercial business?

A. As I state a while ago, that is true until the case that I have mentioned.

Q. Do you recall any other cases where that was done?

19078 A. From that time on I believe it has been done in a number of cases, particularly where the shipment of cement in bulk was involved, the freight rate in that case being figured on 376 pounds instead of 380, when cement was shipped in packages.

Q. Hasn't it been the custom of the Universal-Atlas Company in quoting for delivery in Texas to calculate the State tax at an even 5 cents a barrel?

A. In quoting on commercial business?

Q. Yes.

A. Yes.

Q. (Showing document to witness.) Now, Mr. Stone, showing you Commission's Exhibit No. 1950, will you tell us why a compilation or computation was made in the office of the Universal-Atlas Cement Company, showing a fair distribution of the business on the Colorado River project about which I have just been inquiring?

A. Let us see, the early part of your question was what?

Mr. Wooden: Will you please read the question?

(Last question was read by Reporter.)

A. May I describe rather in detail?

By Mr. Wooden:

Q. Well, will you just answer my question—

A. With respect—

Q. —first?

19079 A. As to why it was made up?

Q. Yes.

A. Well, if I must give a short answer, I may have to say I don't know.

Q. All right.

A. But that is not a full and complete answer.

Q. All right. Now make it full and complete.

A. Well, when an inquiry of any particular size or importance comes to one of our offices, naturally, a number of people discuss it. I may or may not be one, in any individual case. Some one, in the course of such consideration, goes over the inquiry item by item with a pad by his side, making a notation of important items. As an illustration, we must first know whether we want to bid on the whole thing, on the entire quantity. We naturally consider what kind of cement it is, what specifications it must conform to. We determine whether or not it is cement that must be held in bins under special test, subject to shipping instructions from the purchaser.

We must know the time of delivery, the over-all time of delivery, and the rate at which deliveries should be made.

Now, taking all of those things into consideration, we begin to put our bid together. In considering how much to bid on, we may take into consideration figures of the kind mentioned here, although that, in my opinion, is de-
19080 serving of only passing notice.

After bids are in, in many, many instances where large quantities are involved, we use our—we base arguments on our capacity, in trying to induce the contracting officer, if it is a government inquiry, to give us a large share of the business.

19081 Q. You were bidding on the entire business in this particular case, were you not?

A. Yes, sir; but in many instances those large quantities are split up into small awards by the purchasing officer.

Q. Do you mean that ~~in advance of any~~ letting where you might possibly be awarded the entire contract that you make up a compilation that shows what would be a fair distribution of the business?

A. We take those things into consideration.

Now in the case of this individual piece of paper, I don't know why it was gotten up in the exact form that it is.

I know it was made up by a person in the office who probably did not know what it was intended for.

Q. And you don't know what it was intended for, either?

A. What is that?

Q. And you don't know what it was intended for?

A. To the extent that I don't recall having asked it be made up; this particular piece of paper; no.

It is natural to prepare such information as this in connection with an important bid and in connection with our soliciting the business after the bids are opened.

Q. And would you do that even before the bids are opened?

A. At times; yes, sir.

Q. In other words, this is not an isolated case of this sort?

19082 A. I don't recall having seen one in just this form.

That might be made up in various sorts of forms. It may be the people handling the individual inquiry know these figures.

It may be that the person who asked that this be prepared was not familiar with the situation in Texas.

Q. Who did ask that that be prepared?

A. I know Miss Carlson's testimony as it appears in the record in the Texas case. It is that it was probably asked for by one of three persons.

Q. I am asking for your independent knowledge on the subject.

Do you have any, as to who asked that to be made up?

A. As to who asked for this particular paper, no.

Now in getting together such information as I described hurriedly a moment ago, if Mr. Greenly is the one who asked for this, he probably was getting it together along with all the other kinds of information that I have described for consideration in connection with making up the bid.

Q. Mr. Greenly is now dead?

A. Yes.

Q. Can you tell us, referring to Exhibit 1950, what "fair share No. 1, fair share No. 2, and No. 3" are; the difference between those?

19083 A. Well, first let me say, if I may, that the words "fair share" used by the person who made up the statement, I see no reason for calling it "fair share" any more than calling it pro rata based on capacity or any other description that might have been given to it.

What I am bringing out is it is not our custom or habit or policy to speak of "fair share" in connection with making out a bid.

Now the figures in the different columns which I understand your last question to refer to, particularly—

Q. Yes.

A. —are simply this: We secure information—

Q. I am referring to the percentage figures under the column headed "fair share No. 1, fair share No. 2," and another column, apparently percentages, but simply headed "3".

A. That is right. My explanation of those three columns is that we secure information as to the capacity of the mills of our competitors in any way that we can get it. We get it out of trade journals, we get it out of conversations that anybody in our concern may report as having had with a competitor or with somebody who is quoting a competitor.

Q. Haven't you gotten it from rated capacity figures compiled by Mr. Mallory?

19084 A. I was going to come to that. That is another way, and, naturally, we have files that we accumulated during the discussion of allocation of business under the Cement Code as provided in the Code.

Q. Can you say from which source these percentage figures in those columns headed "fair share No. 1, fair share No. 2, and 3" came?

A. I cannot, definitely, from memory, but I can state, generally, that with respect to the San Antonio Company, for instance, whose percentage figure in the first column is 7.98; they, as I have understood for some time, always contended that their mill was just as big in capacity as the mill of the Republic Company now known as the Long Horn Company.

Q. Did you ever know that the San Antonio Company was requesting an increase in their rated capacity from Mr. Mallory?

A. I didn't until I recently saw an exhibit, either in this case or the Texas case, in the form of a letter from the San Antonio Company which I saw, but I did know it was general talk that the San Antonio Company considered itself as big as the Republic Company's capacity.

Q. I still don't know whether you are telling me the source of the percentage figures that appear in those columns.

19085 A. I was using what I just said as one illustration.

Do you mean as to where the figures themselves came from or how they are computed?

Q. Tell us both.

A. Capacities, as we learn them in the ways I have described, naturally are in barrels.

In any particular district we take those barrels and add them up from that—that is a hundred per cent, and from that we determine the percentage of each company in that district.

19086 Q. Do you mean to say that this paper, 1950, is computed on a basis of capacities (indicating)?

A. Yes, sir.

Q. Can you tell me why the capacity of the Universal, for instance, in 1936, should be, in figures, in proportion of figures, rather, 10,373, and in 1937, 22,550?

A. Well, Mr. Wooden—

Q. Did the capacities change anything like that?

A. Well, Mr. Wooden, up to this point we have been talking about these three columns, headed,—the first two,—"Fair Share," and the first ones, No. 1 and 2, and the third one, No. 3, now—

Q. Yes.

A. Those are percentages of capacity.

Q. But aren't those percentages the equivalent of these figures that appear in the third column?

A. Well, but, Mr. Wooden, in describing these figures in the third column here as capacities, they are not capacities, they are—

Q. That is right.

A. —the quantity of 365,000 barrels.

Q. Yes, which was the amount on this project.

A. Which was the amount in that invitation for bids.

Q. Yes.

19087 A. And this—this quantity of 365,000 barrels is divided up into individual quantities, in accordance with the percentages shown in the first column of figures.

Q. In other words, the percentages were the basic material and applied, then, to the barrelage figures; is that right?

A. The figures here are the percentages of capacity of the mills in the district. The figures in the next column

are the division of the total quantity of 365,000 barrels called for in the inquiry, divided up in the proportion of the percentage in the previous column.

Q. I see.

Can you tell me why there is such a difference in the barrelage figures for 1936 and 1937, in that third column?

A. Why, that is the way the invitation asked that the cement be delivered.

Q. In those exact quantities such as a fraction of a barrel (indicating)—let me see where it is—over here in the sixth column,—Trinity shows 31,682 1/2 barrels for 1936; Lone Star, 31,682 1/2 barrels.

Do you mean that the invitation specified any such deliveries as that?

A. Why, no, Mr. Wooden, this is a computation, this is not the invitation. The invitation was, as I recall it, for a total of 365,000 barrels to be delivered within a certain period. Now, those two periods included two years.

I don't know that it was exactly a calendar year. In other words, the two years, 1936 and 1937.

Now, with 365,000 barrels asked for as a total, and that being divided up in the inquiry itself for delivery by months, or approximately, each of those monthly deliveries, or rather, the total of those monthly deliveries for the year 1936, and the same for 1937, were weighted by the percentage figures in this column to arrive at the fair share—or No. 1 column, to arrive at the figures in the next column, which is headed "Barrels."

Q. Now, can you tell me the source of the percentage figures appearing under "Fair Share" No. 1 column?

A. Yes, sir; as I have stated, we learn, in the best way that we can, what the capacity of our competitor's mills are in barrels.

Q. No, I mean, specifically, what the source there is.

A. Well—

Q. As you are giving it, it might have been a number of sources, as I understand it.

A. No, sir. I am sorry we don't understand each other.

Q. All right.

A. I am trying to make it clear, first, before we can get a percentage of capacity I think you must know the barrels of capacity, because the percentage is derived from the number of barrels.

Now, I was starting at scratch. We learn with
19089 respect to any one of the Bureau of Mines' districts what the capacity is of each mill in the district. When we add up that, I mean, in barrels—when we add that up the total number of barrels is 100 percent. Now, then, the capacity of mill A in that district is a certain part of 100 percent. The capacity of mill B is a certain part of 100 percent.

Is that clear?

Q. I think so. But are the percentage figures in the "Fair Share" No. 1 based on Bureau of Mines figures, of capacity?

A. Partially, yes.

The Bureau of Mines' figures are reported by districts, a total for each district. The capacities of the individual mills are supposed to add up to the total reported by the Bureau of Mines. The figures of individual capacities, as we learn them, however, do not always add up to the total of the figures that were originally—to the figures as reported by the Bureau of Mines.

Q. Do you not mean to say, Mr. Stone, that the percentage figures under "Fair Share" No. 1 are a composite of various sources, or are they traceable to one source?

A. I am not—I don't recall offhand, definitely, just the make-up of the figures in the column numbered 1, and the column numbered 2, and the one numbered 3, but any one of those columns is made up on a combination of indi-
vidual capacities of the mills in the district. Now,
19090 the sources from which we have secured those capacities might be any one of those I mention, and perhaps others.

Now, then, after having computed, or listed, such a number of capacities of individual mills, we may learn that, as in the case of the San Antonio mill that I mentioned a moment ago, that the capacities we have just used in this column 1 are not correct, and we make another calculation based on the figures that we do believe to be correct according to our latest information.

The same is true of column 3, and in that way we figured—the figures in the three columns will bear this out on three different bases.

Q. Do you know what the basis was in the other columns of "Fair Share" No. 2 and No. 3?

A. I have already mentioned the San Antonio Company, and my hazy recollection was borne out by this exhibit letter that I have seen recently, where I knew that they claimed that they were as large as Republic. I notice here that if you raised—presumably, if you raise San Antonio's number of barrels of capacity to Republic's number of barrels of capacity, it would naturally change all of these percentages, as is shown in this column here (indicating); and San Antonio and Republic are the same figure, at 12.12.

Mr. Hershberger: You are referring to column 2, are you, in your last statement?

19091 The Witness: Yes.

By Mr. Wooden:

Q. The San Antonio letter that you refer to is that Commission's Exhibit 585-F and G (indicating)?

A. That is the letter; yes, sir; and I have seen that just very recently. I did not know such a letter existed.

Q. Did you make any effort, Mr. Stone, to induce the Government purchasing officials to divide the business on this Colorado River project?

A. If our people did, I should be disappointed to hear that they did, because I—

Q. I asked you if you made any effort to get them to divide it?

A. I don't know.

Q. You don't know whether you made an effort or not?

A. Well, when you say "you," I thought you meant our company.

Q. Well—

A. No, I myself, didn't handle the matter.

Q. Well, did your company?

A. I don't think they did, and I added that I hope they did not, because our mill is the smallest of the lot.

Q. Can you cite any instances in which the Universal-Atlas Company endeavored to get the Government to divide the business on a large project?

A. Why, I can recall definitely that through the 19092 period of years when a number of States—a number of State highway departments—were buying very large quantities, where it was practically a known fact in advance that those known quantities would be divided up among the number of bidders, that we did use arguments as to our own capacity to the best of our ability.

19093 Q. I am speaking about the Federal Government business.

A. Yes, that has been done.

Q. Your company has endeavored to get them to divide the business even though awarded to another company?

A. How is that?

Q. Even though awarded to another company, say, as the lowest bidder?

A. Would you state that again, please, sir?

Q. I say, have you made efforts to get the Federal Government purchasing official to divide business between your company and other companies after it had been awarded to some other company?

A. That is, separate and distinct from the matter of capacity, is it?

I am a little in the dark as to just what the connection—

Q. Yes.

A. We have certainly made efforts, I think, in every case in which we have bid, to get all the business we could, and we have used the argument of capacity of our mill to increase that share to the greatest possible figure—that award to the greatest possible figure.

Q. After the award has been made to another company, have you ever done it?

A. After the award has been made to another
19094 pany we have protested, yes, sir; because we didn't think the award was a square deal to us.

Q. Well, did you try to get them to divide the business with you according to your capacity after the award has been made to other bidders?

A. After an award has been made to other bidders I do not recall that we have ever done that except where we have made a definite protest and that was not on the basis of capacity or on the basis of allocation or award—or portion of award, I should say.

19095 Q. Mr. Stone, you said, as I understood you, that you obtained figures on the capacity of various mills from the Bureau of Mines' reports?

A. No, I don't think I said that; I did not intend to.

Q. Well, what did you mean by bringing the Bureau of Mines' reports into an answer to my question, about
19096 the capacities shown on this Commission's Exhibit 1950?

A. I don't remember just what your questions were, but I think in answer to one of them in an explanatory way I stated that we get the capacities, as I recall it, by districts from the Bureau of Mines. I am not certain of that.

Q. You mean total capacity for a district?

A. Total capacity for a district, and then after we get the capacities of the individual mills in those districts we add up those capacities to see how it compares with the Bureau of Mines' capacity.

Now, I am not certain of that; I am speaking only from recollection.

Q. Well, you cannot get, as a matter of fact, the individual mill capacities from Bureau of Mines' reports, or from the Bureau of Mines, can you?

A. Our company, so far as I know, has never attempted to do so, and I don't know whether we could get them or not; I imagine not.

Q. Don't you know the policy of the Bureau of Mines is not to give out individual mill capacity figures?

A. That is the reason I said I imagine not. We have not made an attempt, so far as I know, to get them.

Q. Don't you understand that the capacity figures of the Bureau of Mines are based on the same data as Mr. Mallory's rated capacity?

19097 A. I am not certain as to that.

Q. You don't know whether they use the three highest months' consecutive production as the basis of their capacity reports?

A. I am not certain as to that.

Q. Do you make the same report on capacity to the Bureau of Mines that you have made to Mr. Mallory?

A. I don't know that we have made definite reports of capacities to Mr. Mallory.

Q. Do you know if Mr. Mallory has a rated capacity for your various mills?

A. I think, in connection with the consideration of that article of the code that provided for allocation of business, that information was furnished by our company. Whether it was to Mr. Mallory or a committee appointed for that purpose, I am not certain, but—

Q. Didn't Mr. Mallory have a rated capacity for those various plants long prior to the code?

A. I think he did. We have never made any secret of

our capacities. In fact, we have used them in our advertising.

Q. Your actual capacities and your rated capacities are not the same, are they?

A. Well, that question of capacity is rather a difficult one to dismiss in a word. People—

Q. Can't you answer my question before you elucidate?

A. What was the question again, please?

19098 Q. That your actual capacities are not the same as your rated capacities, according to Mr. Mallory.

A. No, I think that in almost any case the actual capacity of what the mill could physically do, if you find out what that is, might not coincide with the actual capacity—or the rated capacity, I should say.

Q. You spoke about trade journal sources of information for capacity figures. Can you give me any trade journal sources from which you obtained the percentage of total capacity that was represented by the various mills on Exhibit 1950?

A. I can't from memory, Mr. Wooden, give you—cannot cite a particular publication, but I do know that we have secured information as to capacity of cement mills, some cement mills, in terms of barrels, from trade journals.

Q. Do you mean to say that the percentage of total capacity shown on Exhibit 1950 for the various mills came from trade journal sources?

A. No, sir; I did not say that.

Q. Well, I just wanted to get it clear, whether you intended to give that impression.

A. I think I can make that quite clear.

Q. Well, all right.

A. First, we learned what the mill's capacity is in barrels; having secured that information relating to all mills within a given Bureau of Mines' district, we add up

19099 those capacities and we call that 100 percent.

Q. Yes.

A. Now, obviously, the capacity of each individual mill is a certain part of that 100 percent.

Q. Yes.

A. And that's what those figures there are.

Q. Yes, but I understood you to say that you did not mean to say that the percentages shown here were obtained from any trade journal sources.

A. Not the percentages; no, sir.

Q. Yes. Or the total from which the percentages were derived?

A. Secured from a trade journal?

Q. Yes.

A. No, I don't think we have ever secured from any trade journal the total capacity of all the mills within a given district. We have, however, secured from such sources the capacity of individual mills.

Q. Well, did you get it from trade journal sources, the capacity of individual mills that are shown on this Commission's Exhibit 1950?

A. That question cannot be answered "yes" or "no." Now, over a long period of years we have been securing information from all available sources as to the capacity of all mills in the country, to the extent that we were able to.

19100 Now, we have corrected that sheet because of information secured from this, that, or the other source, and we at all times have some sort of a record of the capacity of practically all the mills of the country.

Q. Is there—

A. Now, we may consider that information as to one particular mill correct, or we may consider it incorrect, and we may use our best judgment as to what we will carry on our sheet as to what the correct capacity of that mill is.

Q. You had that information through Mr. Mallory?

A. Never officially from Mr. Mallory, although I have no doubt that in times past some of us have talked to him about this, that, or the other mill, saying our record of this capacity is so and so, what is your record.

Q. Didn't you have any knowledge through Mr. Mallory of the rated capacities of all mills in the industry?

A. Yes.

Q. Now, what is the source on Commission's Exhibit 1950 of the percentage figures for the Universal-Atlas Company, your company?

A. The source of the percentage figures is the capacity per barrel figure.

Q. Will you say whether or not the percentage figures on Commission's Exhibit 1950 for the Universal-Atlas Company correspond to any percentages that could

19101 be derived from Mr. Mallory's figures on rated capacities?

A. On the exhibit there are three different columns showing percentages of capacity. In some respect the figures within those columns are different from the figures within other columns.

Q. Yes.

A. That on the face of it shows that the percentage capacity figures were derived from barrel capacity figures that differed as to the three different columns.

Q. Yes.

A. Differed in some respects; not in all.

Q. Now, did any one of those three columns, the percentages in any one of those columns, was it based on the Mallory figures?

19102 A. I don't know that I can say "Mallory figures" because that term has been used so many times in this case that the meaning may not be clear.

Those figures there are based on what we consider to be the—that is, in columns 1 and 2, I think, although the barrel figures are not shown on that exhibit—the capacity of our mill from which those percentage figures are derived, is the capacity that we assign to our own mill in Texas.

That, I think, is the capacity that Mr. Mallory also carries for that mill.

Q. Which column does that apply to?

A. Column 1 and column 2.

Q. Why is the percentage figure different in the columns 1 and 2 if based—if they correspond to the Mallory figures?

A. Why, Mr. Wooden, in columns 1 and 2 if there is a difference in the two columns pertaining to any one mill it will obviously change the percentages as related to other mills.

Now the capacity in barrels for our Texas mill was used in arriving at those two percentages.

The same number of barrels produces those two percentages because the capacity of some other mill or mills had been changed in column 2 as compared with column 1.

Q. In other words, if your percentage for Uni-
19103 versal decreased from 9.02 under fair share No. 1 to 8.88 under fair share No. 2, what was that—was that because of a change in your rated capacity or in the rated capacity of the other mills?

A. My recollection is it is in the capacity—because of the change in the capacity of some other mill than our own.

Q. Do you know which one?

A. (Referring to exhibit) Trinity shows a difference—

Q. You don't need to take it from the paper. Anyone can deduce that, I suppose, but I am asking you if you remember which one?

A. Not looking at the sheet—of course, I have looked at Trinity—I don't remember whether any others are changed or not.

Q. You told us about fair share No. 1 and fair share No. 2 columns. What about No. 3 column?

A. In the column that is headed No. 3 the capacity upon which that percentage figure is based is a capacity that, according to my recollection, was claimed by some competitors during the discussions under the Code on the subject of allocations.

Q. Claimed by which competitors?

A. I don't recall which ones.

Q. Well, there are only five concerns on this list. Can't you say which?

19104 A. I don't remember which one.

Q. Out of the five?

A. I don't know which one and I don't know the occasion for it nor when nor how the claim was made. It simply came up either to me or to some one else in the company and in our record we made a note of that fact, or made a note of that capacity.

Q. Was that San Antonio Company?

A. Whether San Antonio said anything about it, I don't know.

Q. Well, you referred to a letter of theirs that you saw this morning that is in evidence here asking for an increase in their rated capacities. Does that refresh your recollection as to whether it was not the one?

A. That letter, as I recall it, showed in each of the two tables in the letter the same capacity in barrels for our Texas mill.

I won't be certain about it, but that is my recollection. You have the letter right here.

Q. Why would you be harking back to figures that came up during the Code period in figuring a fair distribution in February, 1936?

A. In the first place I would say that is not for the purpose of figuring the fair distribution.

That is a heading put on it by someone who, I am
19105 quite sure, didn't even know what the purpose of it was.

I simply say that in passing.

Q. Well, wasn't the purpose in order that as you have said, induce purchasing officials to distribute the business according to your capacities?

A. No, sir. I don't think I ever said that.

I think what I did say or what I intended to say was that we have, on occasion, in dealing with public purchasing officials tried to pursuade them to give us more business than they were intending to give us as an award because our capacity, we thought, justified a larger award than they proposed to give us.

19106 Q. Well, wasn't that answer of yours given in response to my question as to why this statement was prepared?

A. My intention was, in answering your questions, to bring out this thought, that in considering the placing of a bid on any substantial inquiry some of our people analyze that inquiry in a preliminary way and get together information that they believe will be of value in considering our bid.

That piece of paper apparently was made up—

Q. Exhibit 1950, you refer to?

A. Yes, yes, Exhibit 1950, apparently was made up with that purpose in view.

Now, then, depending on the identity of the person who might make such a preliminary collection of information, such information so collected might be considered of importance by the—well, reviewing authority, I would say for want of a better name; some other items submitted or prepared in connection with this type of a bid might be considered of utmost importance.

That thing there I would consider of practically no importance in connection with making up the bid, and if I had been making it up myself it probably would have been simply some scribbled figures to get a general idea of what we might think others might bid, taking into consideration the capacity and size of their mill.

19107 Q. As I understand it, this compilation, Commission's Exhibit 1950, was made up by Miss Carlson?

A. Yes.

Q. An employee of your company.

A. Yes, she has so testified.

Q. Yes.

A. In another case.

Q. Do you know on what basis she put the heading on the paper reading, "Fair distribution of Colorado River Project, Texas"?

A. I have no direct knowledge of that; I know that she testified and has said that she simply wrote it down as a heading of an informal pencil memorandum she was making up.

Q. You expected when this was prepared that there wouldn't be any basis for a distribution of the award on any basis of a lower price by one bidder than another did you not?

19108 Q. Do you understand it?

A. No, sir; it is not clear to me.

Q. All right.

What use would there be in making up a statement of that sort, like Commission's Exhibit 1950, unless you expected and assumed that the bidders were all going to bid the same price?

A. I don't know as I understand the question as it is now. It seems to me that the two things are entirely unrelated.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Would there have been any other use than the one he stated?

The Witness: There might be, Mr. Examiner, in the mind of the person or persons who had a hand in making it up. There might be absolutely no value assigned to it by the third person who might be concerned in considering the bid.

I have tried to make it clear, earlier in my testimony that more or less information is gotten together by people who are considering an invitation for bids before we make out the bids. Some of that information gotten together may be gotten together simply as a waste of time, because—

Trial Examiner Norwood: He is asking you
19109 whether you know of your own experience any use to which this could be put.

Mr. Hershberger: Well, I—

Trial Examiner Norwood: Under the conditions he stated there.

Mr. Hershberger: I think Mr. Stone was explaining that practice in his own way—

Trial Examiner Norwood: Never mind.

Mr. Hershberger: —and perhaps a little longer than someone else might, but it seems to me he was going just to that, Your Honor, when you—

Trial Examiner Norwood: No, I think he was getting away further.

Mr. Hershberger: It seems to me he was explaining what use or what could be the reasons for getting that type of information. I think he ought to be permitted to answer the question.

Mr. Wooden: Well, let me ask another:

By Mr. Wooden:

Q. You couldn't expect to get a distribution of an award on the basis of the relative capacities of the various bidders, could you, unless their bid prices were the same?

A. Does that assume that this was made up for the purpose of securing awards, on those precentages?

Q. No, no, it does not assume that, I do not think.

19110 A. If it does not assume that, I would say that I imagine a contracting officer who is prepared to make an award would not be awarding any part of his business to the bidders whose price was lower than somebody else's, all other thing remaining equal.

Q. Would not award any of it to the lower bidder?

19111 A. I meant the higher bidder.

Q. Yes. In other words, the lower bidder would get it all?

A. Yes; if he were able to take care of it.

Q. Yes. I suppose you were interested, in connection with this compilation or computation, in seeing that Universal Atlas Company got its proportionate share based upon its—the relation of its capacity to the capacity of the whole?

A. Mr. Wooden, if I had had a hand in getting up that paper and I were having it got up for that purpose, I

would have simply jotted down, myself, with a pencil, some capacities and percentages in lieu of a statement as elaborate as that one is.

Q. Well, you were interested, were you not, in getting Universal-Atlas' proportionate share of the total, based upon the relation of Universal-Atlas' capacity to the total capacity, weren't you?

A. I would say, sir, that that is certainly not the case. We were interested in getting the whole order, if we could.

Q. But you were prepared in advance of this letting to take that share of it?

A. No, sir.

Q. Well, what is the purpose for your practice, as I understood it, of endeavoring to get some large purchasers like State Highway Commissions to divide according to the capacities of different mills?

19112 A. I don't think I have said that, sir. I certertainly didn't intend to.

Q. All right; straighten it out, then.

A. What I tended to say and what I believe I did say in, perhaps, other words, was this: That I have known of instances where a State would ask for bids on a very large quantity of cement, upwards of four or five million barrels, where it was quite obvious that the entire order would not be awarded to some one particular bidder.

In such cases where awards have been made or where it appeared that awards would be made to us of a quantity that we thought was too low, we have tried to get that quantity increased and if in those efforts we thought that it would help us in persuading the prospective buyer to give us a larger quantity, we would try to impress him with the fact that our mill was so large we were entitled to a larger quantity than he proposed to give us.

That is what I meant.

Q. Well, in this Colorade River project in 1936. If you couldn't get the whole of it then you wanted, at least, as much as your share, based on the relation of your capacity to the total capacity, is that a fair statement?

A. I have not stated that.

Q. I am asking you if that is a fair statement.

A. You said in your question, "didn't you." I
19113 want you to clearly understand that was not our intent.

Our intent was to get all of this business we could.

Q. You will find that in my question. You wanted to get it all or else, in lieu of that, you wanted to get all you could.

A. I wouldn't put it on that basis. If we couldn't get all, we wanted 90 per cent, and if not 90, 80.

Q. And down to a minimum of your proportionate share related to the total capacity?

A. We would not be nearly as satisfied, as well satisfied, with a smaller share as with a higher share.

Q. In your own mind you thought you were entitled to at least your share of the capacity?

A. No, I don't think that was the case at all. I think that that piece of paper was made up in preparation of the bid and I, myself, attach absolutely no importance to it.

Q. I am not speaking so much of the paper now as I am your policy and attitude on that class of business.

A. On that class of business our policy and attitude, depending on the conditions at our mill at the time and on other conditions, is to get all the business that we can on any particular inquiry.

We do not make any effort to have that business split up on the basis of capacity among all mills.

19114 We sometimes urge that the capacity of our mill entitles us to a larger part of the total than the awarding officer proposes to award to us.

Q. What reason would there be for doing any more in your offices than figuring out the percentage that your own mill had to the total capacity and ignoring what the percentages of the various other mills would be?

A. I should say sometimes in preparing bids on very large quantities we like to know, naturally, about how much we think other people might bid on it.

It is just a matter of figuring in a general sort of a way not having any bearing on our relations with competitors and what they are going to do, and I have no doubt that when that paper was prepared it was prepared in that more or less elaborate shape because we had made somewhat similar studies in connection with the inquiries for very much larger amounts and I see no reason for that paper being made up at all.

Q. Do you have any reason to believe that these various bidders would not bid on the whole of that 365,000 barrels?

A. We had no means of knowing, but, as I stated in the answer to the last question, we have made analyses of this kind in connection with bids on very large quantities and this being a comparatively small quantity as compared to the ones I have just mentioned, this paper served 19115 no particular purpose, that I know of.

Q. As a matter of fact, one of the smaller companies got the whole of the order, didn't it?

A. That is my recollection; yes, sir.

I believe that the original bids were rejected and the award was made on bids subsequently to that, although I am not certain.

Q. What would you class as a large or a larger project, so far as your Texas mill is concerned, if 365,000 barrels is not large?

A. It would depend altogether on the time.

The mere fact that we bid on that entire quantity, as I recall it, shows we figured we were in a position to take care of it and in that connection I might mention that a quantity however large may look smaller if the period of delivery extends over a long time.

For instance, a hundred thousand barrels to be delivered in a week is entirely different from a hundred thousand barrels to be delivered over a period of two years.

Q. Now, Mr. Stone, showing you Exhibit 2267-A-C—you looked at it this morning—it appears from that exhibit that the method employed in arriving at your bid price on this 365,000 barrels,—you start out with $1.75. Is that your base price at Atoo?

A. That is what has been called the base price in 19116 these proceedings.

Q. Then the added 5-cent tax, is that the State tax?

A. Yes.

Q. And 65 cents commercial freight; is that what that is?

A. That is right.

Q. 40 cents for sacks?

A. That is right.

Q. Making a total of $2.85?

A. Yes.

Q. Then .047 is deducted as and indicated as "less actual tax"?

A. Yes; that being taken out, apparently, because in sales to the Government there is no State tax payable.

Q. And making a total final figure of $2.803?

A. $2.803, yes.

Q. Now the fact is, is it not, that 3/10ths of a cent per barrel was in addition to your base price, wasn't it, and exclusive of the actual tax paid?

19117 A. Exclusive of the actual tax paid, yes.

Q. Wasn't it in addition to your base price of $1.75?

A. Yes, unless one considers the base price to be—I will say again, the so-called base price to be—$1.75 plus 5, making $1.80. I have heard it spoken of within our own company both ways.

Q. Well, the fact of the matter is there that you bid three-tenths of a cent per barrel more than your base price at Atco, after the State tax is deducted, isn't that right?

A. No, we have bid a delivered price that when figured back to our mill by the deduction of freight shows the figure of $1.70—wait a moment—.

Q. Would it not be $1.753?

A. Let us see (referring to data, and figuring on pad).

Q. I supposed that an old hand like you in the business could figure those things much more quickly than that, Mr. Stone.

A. Well, it has been a long time, Mr. Wooden, since I have figured one of these.

A. I can't be certain as to that, Mr. Wooden, that 19118 is, to dope it out and analyze it.

By Mr. Wooden:

Q. Well, you deduct the freight and the sack,—just leaving out of consideration.

A. I suppose.

Q. Then, as the sheet shows, you add 5 cents tax and deduct 4.7 actual tax,—does not that mean there was three-tenths of a cent more added to your base price?

A. Yes, it looks so.

Q. So that if you had shipped from Atco Mill, then your mill net would have been $1.753, would it not?

A. $1.753, that appears to be correct.

Q. Yes.

Now, how is it that you would add three-tenths of a cent to your base price in such a bid as this instead of merely making your bid based upon the base price plus freight?

A. Because we have found that competitors were offering prices figured in that similar manner.

Q. And you expected that to continue on as large a quantity of business as 365,000 barrels?

A. We had found—I cannot say that we ever expected a price to be anything with any certainty. We have seen what competitors were doing, and we make our prices accordingly.

Q. Now, as a matter of fact, in this case the bidders all added that three-tenths of a cent, did they not,

19119 to the base price?

A. As I recall it, they did.

Q. Mr. Stone, I understood you to say that this paper, Exhibit 1950, was not important in your mind because the barrelage involved is not very large.

A. That is not the entire reason, but I said it was not of the same class as those four or five million barrel inquiries where we knew that—practically knew that the awarding officer was not going to award to one mill, and I think it is because we had gotten up information along that line to use in those very large inquiries that was gotten up in connection with this one.

Q. Did you consider the calculation of distribution on the capacity bases important in such cases?

19120 A. Which cases?

Q. The cases of large quantities such as you mentioned.

A. Only in the way I described.

Q. But you did make similar calculations in such cases?

A. We did make calculations to see what we thought other mills might be able to handle, and also as to what general proportion we might make demand for, if you call it that, in case they were going to make an award to us that we thought was too small.

Q. Can you name any other projects on which a compilation or computation was made, similar to Exhibit 1950?

A. I don't know of any case in which one exactly in that form was made.

Q. I don't mean exactly in that form, but I mean one showing similar information.

A. I do know one in—I was going to say—many instances, perhaps it isn't many, but in the case of some of these large awards we have figured in a rough way about what the various mills' capacities were, and ours, also, and we have used that, as I have stated, to induce the prospective buyer to give us a larger proportion than he, perhaps, had intended to give us.

Q. Do you use Mr. Mallory's figures on rated capacity for some help in that connection?

A. When you speak of "Mr. Mallory's figures," 19121 I don't know that any of our figures could be designated as "Mallory's figures."

Q. Corresponding to them?

A. Or as corresponding to them. That is, in the sense of being the same as Mr. Mallory's figures. Mr. Mallory might have had the capacities of some mills in his mind that did not agree with the capacity of that same mill that we had in our mind.

Q. But you did have available the Mallory figures?

A. To the extent that we had them, yes. I don't know that we ever have had official Mallory figures of capacities of all mills.

Q. What do you mean by "official Mallory figures" as distinguished from just ordinary Mallory figures?

A. We had no figures sent in to us as being official capacities. I don't know that we have figures of capacities that we considered as official.

Q. You have had capacities received through Mr. Mallory?

A. I will state it this way: We have kept this unofficial record in our office of capacities for many years. We, no doubt, have asked Mr. Mallory from time to time, or he, perhaps, has asked us, "What is your idea of the capacity of such and such a mill?"

If he had the same figures we had, all right; if not, if it varied, we might retain our figures and he might 19122 retain his.

Q. Can you name any specific large project on which computations were made similar to what appears in Commission's Exhibit 1950?

A. I think I answered a while ago that I recall none exactly like that, although I do recall that we have figured, in a rough way, in connection with other large inquiries on more than one; just what occasion, I am unable to state at the time.

Q. Can you name any such?

A. I think in connection with bids to some of the midwestern States, when they were in the habit of buying almost each year very large quantities.

Q. Can you name any other case applicable to bids on Federal Government purchases?

A. I don't know of one offhand, no.

Q. Do you have a man in your organization, or have you had, by the name of Max A. Berns?

A. Yes, sir.

Q. Who was he?

A. He is the manager of our publicity bureau.

Q. How long has he been with you in that capacity?

A. I don't remember the exact number of years, but it has been a number of years.

Q. (Showing document to witness) I am show-
19123 ing you Commission's Exhibit 836-RRR; is that Mr. Berns' signature there (indicating)?

A. (Examining document) I believe it is.

Trial Examiner Norwood: Are you familiar with his signature?

The Witness: More or less; yes, sir.

By Mr. Wooden:

Q. (Showing document to witness) Showing you Commission's Exhibit 433, is that Mr. Berns' signature?

A. I believe it is.

Q. Now showing you Commission's Exhibit 576-PPPP, is that a letter of yours, or office copy of a letter written by you (showing document to witness)?

A. (Witness examines document) Yes.

Q. Do you know whose handwriting it is in the upper right-hand corner (indicating)?

A. In the extreme corner the initials written down were written by me; the other notations I do not recognize the handwriting.

Q. All right.

(Showing document to witness) Showing you Commission's Exhibit 806-EEE, is that your signature to that letter?

A. No, sir.

Q. Is it your name, even?

A. (Witness examines document) No.

19124 Q. (Showing document to witness) Showing you Commission's Exhibit 836-NNN.

Mr. Hershberger: What was that number, please?

Mr. Wooden: 836-NNN.

By Mr. Wooden:

Q. (Resumed) Do you recognize that as Mr. Max Berns' signature?

A. (Witness examines document) I believe it is.

Q. Have you had a man in your organization, Mr. Stone, by the name of Frank Guy?

A. Yes.

Q. What is his position?

A. General traffic manager.

Q. Are you familiar with his signature?

A. I am not certain that I am.

Q. (Showing document to witness) Well, I will show you Commission's Exhibit 883-N; do you recognize the signature on that letter,—is that it?

A. (Witness examines document) I believe that is his signature.

Q. Is that your Mr. Guy?

A. Yes.

Q. Now showing you Commission's Exhibit 883-Q, is the signature to that letter that of Mr. Guy?

A. I believe it is.

19125 Q. Now showing you Exhibit 883-CC, is the signature to that letter that of Mr. Guy?

A. I believe it is.

Q. Now showing you Exhibit 749-VV, is the signature to that letter that of your Mr. Guy?

A. I believe it is.

Q. Showing you a paper marked for identification as 1738 is the signature to that letter that of your Mr. Guy?

A. I believe it is. I don't know whether that is a facsimile or handwriting.

Mr. Hershberger: That was 1738?

Mr. Wooden: Yes.

By Mr. Wooden:

Q. Showing you Exhibit marked 1509, for identification; is the signature to that letter that of your Mr. Guy?

A. I believe it is.

Q. Now showing you Exhibit 1511, for identification, is the signature to that letter that of your Mr. Guy?

A. I believe it is.

Q. Now showing you Exhibit, for identification, 1562-A, is the signature to that letter that of your Mr. Guy?

A. I believe it is.

Q. Now showing you Exhibit, for identification, 1761, is the signature to that letter that of your Mr. Guy?

A. I believe it is.

19126 Q. Now looking at Exhibit 1804, for identification, is the signature to that letter that of your Mr. Guy?

A. I believe it is.

Mr. Leisure: Are those the Reporter's numbers? I have never seen them numbered that way.

Mr. Wooden: There are various groups and that is the way they are done all through this group.

The Witness: There are various pencil numbers on there.

By Mr. Wooden:

Q. Showing you Exhibit 922-B, do you recognize the handwriting in the upper left-hand corner?

A. I won't be sure.

Q. Isn't it the handwriting of your Mr. A. L. Stark?

A. I can't say, positively, that it is.

Q. Showing you Exhibit 922-H in the upper left-hand corner, whose handwriting is that?

A. I will have to make the same answer as I did to the last question; I can't say, positively.

Q. Does it resemble the handwriting of Mr. Stark?

A. As to the handwriting, I can't say that I know one way or the other.

Q. Are you familiar with his handwriting?

A. I see it occasionally. That initial is not in the form of his signature as I carry it in my mind.

19127 Q. Did you have a Mae, M-a-e, in your organization?

A. I can make a guess about this.

Q. I mean, as to Mae.

A. Yes, these is a girl in the organization whose name is Mae.

Q. Related to—does she work for Mr. Stark, in any way?

A. Yes.

Q. And do you know who J. H. is?

A. I can make a guess at that, also.

Q. You have a J. H. in your office?

A. We have a man in our office named Healy. Whether he has a middle initial, I can't remember.

Q. Is he associated in any way with Mr. Stark?

A. He is in Mr. Stark's office; yes, sir.

19128 Q. Mr. Stone, did you ever have any success in inducing federal purchasing agencies, or agents, to

divide business among various bidders on the basis of their capacities,—mill capacities?

A. So far as I know, we have never tried to do that.

Q. Did I misunderstand you in saying that that was why this Commission's Exhibit 1950 was made up, so that it might possibly be used for that purpose?

A. I think I said that in connection with very large inquiries we have gone to the prospective purchaser and tried to induce him to increase the quantity, that he might award to us, because of our comparatively large capacity—because of our capacity as compared with the quantity that might otherwise be awarded to us.

Mr. Wooden: All right, sir. Nothing else.

Trial Examiner Norwood. Examine him.

Cross-Examination by Mr. Leisure.

Q. Mr. Stone, will you look at that Exhibit 1950?

Mr. Leisure: Will you give it to him, Mr. Wooden, please?

(Mr. Wooden hands documents to Mr. Hershberger.)

Mr. Leisure: Would your Honor mind following that (handing papers to Trial Examiner) so that the testimony will be clear?

19129 Trial Examiner Norwood: Thank you.

By Mr. Leisure:

Q. Have you got that exhibit before you, 1950, which Mr. Wooden showed you?

A. No, sir; I have not.

Q. Oh, here is a copy.

19130 Q. Now, there seems to be some confusion in Mr. Wooden's mind as to what this exhibit shows. Will you look down at the column, second column, under "Barrels,"—it is really the third column.

A. Yes, sir.

19131 Q. Will you look at the last figure there,—365,000?

A. Yes, sir.

Q. What was that, Mr. Stone? What did that figure represent?

A. That represents the total quantity of cement to be purchased under the invitation for bids.

Q. Yes. And the two figures just above 365,000, what are they; 115,000 and 250,000?

A. The invitation contained a list of probable deliveries by months throughout the life of the proposed contract which was, approximately, two years. It extended a little into the year 1938 but for all practical purposes the cement was to be delivered at certain stated quantities per month through the two years 1936 and 1937.

The total of the estimated monthly deliveries in the year 1936 was 115,000 barrels and the total of the estimated monthly deliveries in 1937, with just a little of it extending over into 1938, was 250,000 barrels, the two to-
19132 gether making up the total of 365,000 barrels covered by the invitation.

Q. And when you say "the invitation," what invitation are you speaking of?

A. The invitation for bids.

Q. With respect to what?

A. With respect to this project as it is described here as the Colorado River project of Texas.

Q. Now, looking at the second column. I notice there is a hundred percent opposite "Total."

A. Yes.

Q. What does that represent with respect to the figures above it under the whole column No. 1?

A. That is the total of the figures in that column No. 1.

Q. In other words, if you add the figures opposite "Trinity," which is 30.93, and the figure opposite Lone Star, which is 27.56, and Southwestern, which is 12.11, and the figures opposite Republic, 12.40, and the figures opposite Universal, 9.02, and the figures opposite San Antonio, which is 7.98, you will get what?

A. Those amounts that you have just read off, if pointed off to two decimal places, add up to 100.

Q. One hundred percent?

A. One hundred percent.

Q. Taking the next column, column 2, I notice
19133 also a hundred marked there. What is the relation of that figure in relation to the figures above it?

A. That can be described the same way as in column 1 as the total of all the figures pointed off to two decimal places.

Q. And column 3, I notice at the bottom of that is, a figure of 100 and above it certain figures. What does it represent with respect to the figures above it?

A. That 100 represents the sum of all of the figures shown in column 3, those amounts being pointed off to two decimal places.

Q. Mr. Wooden spoke to you several times about the figures which appear opposite, for instance, the figure 1936 in the third column and the figure which appears opposite 1936 in the fifth column, and in the last column, as percentages. What are those? What do they represent?

19135 Q. As to the objection, Mr. Stone, I believe you testified this morning that a young lady—what was her name—you said prepared it?

A. Miss Carlson.

Q. And I think you said she had stated it was prepared at the instruction of three people?

A. One of three.

Q. One of three. Who were those three?

A. She was not sure who. They were Mr. Greenly, Mr. Rohr, or myself.

Q. And as I recall, Mr. Rohr has already testified he had nothing to do with the paper.

Who was Mr. Greenly. What was his relationship to you?

19136 A. Mr. Greenly was an assistant of mine.

Q. And if she had prepared this paper under the instructions of Mr. Greenly, as his assistant, would it have come to your attention in any way—would he have gotten your approval, or authority?

A. For what?

Q. This paper,—would you have seen it at the time, in any way?

A. I might have seen it at the time, yes.

Q. As his superior?

A. In connection with his study of the bid that we might submit.

Q. Now, this morning, Mr. Wooden asked you some questions about their dividing the amounts up to shipments of half a barrel to the Government, or to the State, and I note there that there is one figure, two figures, in fact, carrying one-half.

Will you look at it in the fifth column, where the figure is 31,682½, and explain what that figure is, if you know?

A. I think Mr. Wooden's original question was whether

those or figures similar to that were capacities; I said they were not capacities, but they were quantities included within the total amount named in the invitation for bids.

Now, that particular figure or amount that you
19137 point out of 34,682½ barrels is the result produced by multiplying 115,000, opposite the year 1936 at the bottom of the column, by the capacity percentage figure of 27.55.

Q. In other words, do I understand you to say, Mr. Stone, that all of these figures here in columns 3 and the last column—column 6—

Mr. Hershberger: Five.

By Mr. Leisure:

Q. —column 5—could be done by any clerk—

A. That is column 5.

Q. —merely by multiplying the percentage figure of capacity against the total amount called for in the bid? For instance, I see there is 115,000 plus 250,000, making 365,000.

A. Well, each one of these figures in the right of that wide column headed "Barrels" is the result of multiplying either 115 for the year 1936—

Mr. Hershberger: 115,000, you mean?

The Witness: 115,000 for the year 1936, or the figures 250,000 for the year 1937, by the percentage capacity figure in column 2.

By Mr. Leisure:

Q. Well, take a simple figure there, take the figure 8 under column 3.

A. Yes.

Q. How would you arrive—

19138 A. Under column 3, as related to the last column on the Exhibit 1950?

Q. Yes.

A. 115,000 barrels, which is opposite the year 1936, at the bottom of the column, when multiplied by eight, produces a result of 9,200. That figure 8 I mention is 8 percent.

Q. Yes.

A. Multiply 115,000 by 8 percent and you get nine million—9,200 barrels.

Q. What about the other figure, 20,000?

19139 Q. Well, to follow the suggestion and save time, Mr. Stone, does the figure 20,000—is that arrived at in the same way, merely by multiplying the eight against the 250,000.

Mr. Paulson: We do not save time by continuing the line of questions, Your Honor please.

Trial Examiner Norwood: Let us proceed, might as well.

A. Yes.

By Mr. Leisure:

Q. So, as I understand, you and the clerk in your office could compare these figures mathematically, as you have described?

A. Once given the figures.

Q. Yes.

A. To use as a basis for the figures.

Q. Yes.

A. Simply a matter of arithmetic.

Q. Yes.

And as to these different columns showing capacity, there are three different ones. Will you explain to the Examiner what they are?

19140 A. Those three different ones show percentage capacity figures. Obviously, they could be arrived at only by knowing the capacities in barrels for each of the mills named on the exhibit. Once knowing the number of barrels of capacity, they can be added up to a total, and then each mill's capacity is a certain percentage of that total, and those percentages are the percentages written in columns 1, 2, and 3.

Q. And the three columns, as I understood you, on direct, when Mr. Wooden asked you about—the three columns represent the three possibilities of different capacities?

A. Yes, there is a different set of capacities in barrels used as a basis for the percentage figures in each of the three columns, 1, 2 and 3.

Trial Examiner Norwood: Why did they make those three different sets,—was that on different estimates?

The Witness: Yes. As stated in earlier testimony, we have carried on this informal record of capacities, and

there are differences of opinion, sometimes, as to capacities, so we have one set that we will call No. 1, one set of capacities we will call No. 2, another set of capacities we will call No. 3.

Trial Examiner Norwood: Yes.

The Witness: In those different sets the differences may be as regards any one of the mills within that column.

Trial Examiner Norwood: I see.

19141 By Mr. Leisure:

Q. And the capacity, as I understand you, might have been, as represented by the first column or might have been as represented by the one column No. 2, or it might have been No. 3. You have figured it on the basis of three different possibilities?

A. That's right.

Q. And all of these figures are arrived at in each column by mathematical process, as you have explained?

A. Yes, sir.

Q. Now, did your company get any part of this award?

A. We did not.

Q. Did you ever, either before the bid was awarded or after it, talk to any of the companies that are listed on that list with regard to Exhibit 1950?

A. I did not.

Q. If you had would you have known which capacity they claimed for their mill instead of the three purported capacities, which you have figured out in that way?

The Witness: Would you repeat that question, please?

Trial Examiner Norwood: Read it, please.

(Last question read by Reporter.)

Mr. Leisure: Three possibilities.

A. If I had talked with them, I wouldn't have

19142 known what capacity as represented by the percentage figure in columns 1, 2, or 3, represented the barrel capacity that they themselves claimed for their own mill, particularly if their own mill was one whose capacity was different in these different columns.

Q. Did you, Mr. Stone, have any conference with any one of these mills, or their representatives, about the distribution of this order, either before or after the Exhibit 1950, the award, was made?

A. I did not.

19143 Q. Now Mr. Wooden by several indirect questions asked you whether or not Mr. Mallory had given

you rated capacity figures on mills. Now what is this—making a direct question out of it and not answering it inferentially—did Mr. Mallory, to your knowledge, ever furnish you with rated capacity of mills at any time, if you know?

A. Not that I know of unless it was during the discussions about mill capacities in connection with the allocation clause in the Code.

At that time it was generally known by all companies, I think, what Mr. Mallory's list of capacities was.

Q. Now Mr. Wooden also asked you how the Universal-Atlas bid on the Hamilton Dam was computed and he called your attention to the inclusion of 5 cents per barrel for State tax and then the deduction of 4.7 cents for the tax.

Do you recall that question?

A. Yes.

Q. Then Mr. Wooden asked you whether this difference of 3/10ths of a cent amounted to an increase in the base price. Do you recall that?

A. In that connection and in other connections I, myself, am not satisfied with the expression "base price".

There is a figure at our mill to which we add freight and various other things to arrive at a destination price. That figure has been known in the general jargon of the 19144 industry as the base price.

In this particular instance we figured out what our ordinary destination price would be and from that we deducted 4.7 cents because the tax was not payable on shipments to the Government.

The result of that deduction was to make our delivered price a figure that, after freight and packages had been deducted, left what I will call a net at our mill before deduction of discount of $1.753.

Mr. Leisure: That is all.

Mr. Hershberger: I would like to ask a few questions about this other exhibit, if you don't mind, Mr. Examiner.

Trial Examiner Norwood: Certainly.

By Mr. Hershberger:

Q. You were asked this morning, Mr. Stone, regarding Exhibit 267-A, B, and C, I believe it is called.

A. Yes.

Q. And I think Mr. Wooden asked you the question as to whether you could explain what he called a saving to

the Government of $1916 or perhaps $1936 if the Government should take shipments with respect to the Hamilton Dam project on Government bills-of-lading, and I think there was some confusion about that at the time and that you were unable to answer it.

19145 Mr. Hershberger: That is a correct summation, is it not, Mr. Wooden?

Mr. Wooden: I don't quite agree about confusion. I was merely asking him to explain the thing and that is all there was to it.

Mr. Hershberger: Let me go on.

By Mr. Hershberger:

Q. (Continuing) During the noon hour did you make some inquiry into that?

A. I did, yes.

Q. And can you tell me, now, what the $1916 or $1936 that was mentioned, is?

A. I will try to give that in words—because if it is necessary to get a pad to carry it out on—I would like to be allowed to do it.

Q. In the first place let me ask; do you know how much cement was called for in the Hamilton Dam project?

A. Yes; the quantity was 365,000 barrels.

Q. Was that divided into something?

A. That was divided into 295,000 barrels in cloth and 70,000 barrels in bulk.

Q. Now did your company made a bid in two ways; that is, did you bid alternatively?

A. Yes.

Q. And what were the alternatives?

19146 A. For cement in cloth we bid $2.803 as the destination price.

Still speaking of cloth we bid $2.799 as a destination cost, the difference between the destination price of $2.803 and the destination cost of $2.799 is .004 cents.

Q. Per barrel?

A. Per barrel.

Q. Now you might stop just at this point before making any further computations to explain what the difference is between this destination price and the bid that you mentioned as destination cost.

A. The destination price included a commercial freight rate of $.65. The destination cost included actual commercial freight rate carried out in fractions of $.646.

Q. The difference between those freight rates is .004 cents per barrel, is it not?

A. Which is the same as the difference between the destination price in cloth and the destination cost in cloth.

Q. Now the destination cost in cloth is the type of bid that you made that would permit the Government to ship the cement on its own bill-of-lading, is that correct?

A. Yes; it would be required to use its own Gov- 19147 ernment bill-of-lading on such shipment.

Q. Will you go on and explain the difference between the destination price bid and the destination cost bid on the bulk cement.

A. The destination price in bulk was $2.353.

The destination cost in bulk was $2.3422, the difference between the destination price, of $2.353 and the destination cost of $2.3422 is .0108 cents per barrel.

Now multiplying the 235,000 barrels in cloth.

Q. 295,000, you mean?

A. 295,000 barrels in cloth by .004, as referred 19148 to above and multiplying the 70,000 barrels in bulk by the .0108 referred to above, the result is $1936, I think it was, as mentioned by Mr. Wooden.

Q. In other words the $1936 is a total lower cost to the Government if they would take your alternative bid that was called the destination cost bid than the destination price to the Government if they bought on the bid called the destination price bid, is that correct?

A. That is correct.

Q. And that is all the $1936 refers to?

A. That is right.

Q. There was nothing in your bid that referred to this $1936 as a special concession, but it is merely a computation arrived at in the manner you have just shown, is that not correct?

A. That is correct.

Q. Mr. Wooden asked you before the luncheon hour, Mr. Stone, about some of these invitations for bids on which you said that you had protested I believe; made protests.

I would like to have you explain a little more clearly just what you had in mind. In other words, in what type of instance have you made protests that you did not get as much of an award as you thought you should get?

Let me put it this way, first: Was your protest on the

basis that the invitation should have been awarded
19149 partly to you and partly to your competitors on some basis?

Trial Examiner Norwood: I don't think you should lead the witness that way. You asked him what his reasons were. Don't put answers in his mouth.

By Mr. Hershberger:

Q. We will put it this way, then: Will you explain further what you had in mind when you talked about protesting bids.

A. I had in mind—and I would prefer, unless it becomes necessary later, not to mention the specific case—I had in mind one invitation for bids received from a Government department to which we submitted a bid that, according to our figuring, was lower than any other bid submitted and lower than the next low bid to the extent of some $40,000 on the entire transaction.

The Government department concerned made the award to the next low bidder and we protested, definitely, that we were not receiving fair treatment.

The department concerned insisted that its decision was one that it could properly make and we made further protests but failed in the end to make our—to secure any benefit from our protest.

Q. Did your protest in any way involve a request that the business be divided, in any way?

A. No, sir; quite the contrary.

Q. In other words your protest was that you
19150 should have received the entire order?

Yes, sir.

Q. And you didn't mean by your testimony this morning, or did you, that any of your protests ever were on the basis of dividing an order?

A. No.

Q. What was this instance that you have referred to?

A. It was an invitation from the Corps of Engineers to bid on the project called Conchas Dam, in New Mexico.

Q. About when did that occur?

19151 A. I think along last July. The other case I had in mind—

Q. Did I interrupt you?

A. The other case I had in mind was more recent, involved a substantial quantity of cement on which there

were, as I recall, 14 bidders. The bids of two of them were discarded as not being in accordance with the invitation, and the remaining twelve were drawn by lot. I think three drawings were had, and there were three successful contenders as a result of the drawing.

Our company lodged a protest on the ground that of the 12 bids, from which the drawing was made, certain ones, or none of them, was strictly as good as ours.

Q. You mean by that as favorable to the purchaser?

A. As favorable to the purchaser as ours. That some of the others were as favorable in only two particulars, and some were as favorable as ours in only one particular; that ours were more favorable in three particulars, and we, therefore, made a claim for all of the business, and if the department concerned saw fit not to give us all of the business that we at least should be allowed some portion of it for the reasons just stated. In other words, if they were going to award to three people, as they had arranged to do by the drawing, we wanted to be the only one, or we wanted to be two of the three, or we wanted to be one of the three, at least, and in lieu of making any award to us at all, if they couldn't see their way clear to do it,
19152 we made an urgent request that they reject the bids and take them over again, because we believed that we were low bidder.

Q. In that protest, as well as in the other one, you were speaking purely for the Universal-Atlas Cement Company and not for some other company?

A. Oh, absolutely, for ourselves only.

Mr. Hershberger: That is all, I believe.

Redirect Examination by Mr. Wooden.

Q. Mr. Stone, do you personally know of any differences in the Government freight rates and the commercial rates that would have any application to this Hamilton Dam project?

19153 A. As I recall it, there were no Government rates, if that term means land grant rates, involved in the transaction.

By Mr. Wooden:

Q. In other words, it is your understanding that the rates on this business to the Government were the same as the commercial rates,—is that right?

A. The same as commercial rates?
Q. Yes.
A. Yes, except in the one case we used a freight rate with fractions—that is, we used a freight rate carried out to only two decimal places, and in the other case used a freight rate, same freight rate, carried out to three decimal places.
19154 Q. Why would the destination cost to the Government, under those conditions, be any different than the destination cost to any other purchaser?
Mr. Leisure: You mean the destination price?
Mr. Wooden: Yes.

By Mr. Wooden:

Q. The destination price to any other purchaser.
A. Well, the mere fact that one included the freight rate carried out to two decimal places and the other one included a freight rate carried out to three, would account for the difference.
Q. And you applied the one in your bid carried out to two places, instead of three?
A. In one part of the bid we used a freight rate carried out to two places, and in another part of the bid we used a freight rate carried out to three places, and I think it was brought out this morning that our reason for doing that was as I then explained.
Q. Well, why would you carry it out to two places in one case and to three places in the other?
A. I think that was explained in the morning testimony, where I stated that we had been notified by one of our officers, and my recollection is that it was the Birmingham office, that they had seen some bids by a competitor carrying out the—that is, apparently included a freight
19155 rate carried out to three decimal places instead of the usual two, that had been used, so far as we know, by practically everybody in the business theretofore.
Q. You thought because that was done over in and around Birmingham, that it also could be done in Texas?
A. I remember it having been done in Birmingham, and I am quite sure it was done in other places, before this particular bid came up.
Q. Did you make your offer of concession for handling on Government bill-of-lading along with your bid?
A. I stated this morning that we may have made such an offer in some bid. I don't remember when it was, but

I didn't remember whether it was in that bid or not. At lunch I have looked into it sufficiently to determine that we didn't have any provision in our bid in the nature of an allowance if the Government chose to ship Government bill-of-lading, and that the difference that you mention was arrived at in the way I have described as is shown on the face of the two exhibits.

Q. Well—

A. May I put in that exhibit number to make that clear?

Q. I don't know, is this the one you are referring to, Commission's Exhibit 2267 (showing document to witness)?

A. (Witness examines document) Yes, 2267-A.

Q. Now, the testimony of Mr. Taylor of the Reclamation Service dealt somewhat with this matter of the allowance for handling on Government bill-of-lading,

19156 and I am just trying to ask whether you submitted such an offer for such an allowance along with your bid, or turned it in later?

A. To the best of my recollection, there was no allowance of the kind you describe offered in connection with this bid; that is my recollection.

Q. Well, notwithstanding the testimony of Mr. Taylor that I refer to?

A. I haven't referred to Mr. Taylor's testimony for a long time, but my recollection is that he interpreted a difference between the destination price and the destination cost as being an offer to the Government in some sort of connection with the making out of shipping papers.

By Mr. Wooden:

Q. Well, what was it if not for that? What was the difference in the destination cost and the destination price due to, if not to that?

19157 A. The difference between the two is the difference between the two—the freight rate carried out to two places, and the freight rate carried out to three places.

Q. Why did you carry it out to three places in one instance and to two places in the other?

Trial Examiner Norwood: He has already explained that.

Mr. Leisure: We were over it on direct, and now redirect—

Mr. Paulson: I do not think so.

Mr. Leisure: We were over it fully indirect.

Mr. Brick: Four times, Your Honor.

Trial Examiner Norwood: He said it was because of the other bidder that he did that.

The Witness: That's right.

Trial Examiner Norwood: If you can explain anything further, go ahead.

Any other reason?

The Witness: I don't think there is anything further to say.

Trial Examiner Norwood: He heard it around in that way.

Washington, D. C.,
April 11, 1939.

19167 Trial Examiner Norwood: I will ask the Counsel on both sides to check these.

Let the corrections be made subject to check.

Now, I have studied these exhibits here, Commission's Exhibits, for identification, 2965-A to 3007-C, as offered on March 31.

The objections are overruled and they are received as marked.

It seem to me that a few of these might be left out, but I suppose when you take the case up you will withdraw duplicates and letters covering practically the same thing.

(COM. EX. 2965-A and 2965-B was offered and received in evidence.)

(COM. EX. 2966-A and 2966-B was offered and received in evidence.)

19168 (COM. EX. 2967 was offered and received in evidence.)

(COM. EX. 2968 was offered and received in evidence.)

(COM. EX. 2969 was offered and received in evidence.)

(COM. EX. 2970 was offered and received in evidence.)

(COM. EX. 2971 was offered and received in evidence.)

19169 (COM. EX. 2972 was offered and received in evidence.)

(COM. EX. 2973 was offered and received in evidence.)

(COM. EX. 2974 was offered and received in evidence.)

(COM. EX. 2975 was offered and received in evidence.)

19170 (COM. EX. 2976 was offered and received in evidence.)
(COM. EX. 2977 was offered and received in evidence.)
(COM. EX. 2978 was offered and received in evidence.)
(COM. EX. 2979 was offered and received in evidence.)
(COM. EX. 2980 was offered and received in evidence.)
(COM. EX. 2981 was offered and received in evidence.)
19171 (COM. EX. 2982 was offered and received in evidence.)
(COM. EX. 2983 was offered and received in evidence.)
(COM. EX. 2984 was offered and received in evidence.)
(COM. EX. 2985 was offered and received in evidence.)
(COM. EX. 2986 was offered and received in evidence.)
(COM. EX. 2987 was offered and received in evidence.)
(COM. EX. 2988-A and 2988-B was offered and received in evidence.)
19172 (COM. EX. 2989 was offered and received in evidence.)
(COM. EX. 2990 was offered and received in evidence.)
(COM. EX. 2991 was offered and received in evidence.)
(COM. EX. 2992 was offered and received in evidence.)
(COM. EX. 2993 was offered and received in evidence.)
(COM. EX. 2994 was offered and received in evidence.)
19173 (COM. EX. 2995 was offered and received in evidence.)
(COM. EX. 2996 was offered and received in evidence.)
(COM. EX. 2997 was offered and received in evidence.)
(COM. EX. 2998-A and 2998-B was offered and received in evidence.)
(COM. EX. 2999 was offered and received in evidence.)
(COM. EX. 3000 was offered and received in evidence.)
19174 (COM. EX. 3001-A and 3001-B was offered and received in evidence.)
in evidence.)
(COM. EX. 3002 was offered and received in evidence.)
(COM. EX. 3003 was offered and received in evidence.)
(COM. EX. 3004 was offered and received in evidence.)
(COM. EX. 3005-A, 3005-B, 3005-C, 3005-D, 3005-E and 3005-F was offered and received in evidence.)
(COM. EX. 3006 was offered and received in evidence.)

(COM. EX. 3007-A, 3007-B and 3007-C was offered 19175 and received in evidence.)

Mr. Wooden: It was understood, Your Honor, when we recessed on Friday that Mr. Zimmerman would proceed this morning with a statement concerning the information requested from the Marquette Company in Kansas City.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: Is it agreeable that I go ahead now?

Trial Examiner Norwood: Proceed.

Mr. Zimmerman: Does Your Honor prefer I stand while making the statement?

Trial Examiner Norwood: Do as you please.

Mr. Zimmerman: All right, thank you, it is a little easier with these papers; if Your Honor will permit me, I will sit.

In further response to certain questions and requests made by Mr. Wooden while Mr. W. A. Wecker, president of the respondent Marquette Cement Manufacturing Company, was on the witness stand at Kansas City, Mo., he having been called as a witness to testify on behalf of the Federal Trade Commission, Counsel for the Respondent Marquette Cement Manufacturing Company now responds as follows:

19176 The response, the information, and statements herein disclosed are tendered as a voluntary action on the part of the Respondent to be accepted as a whole, and not separately, and upon the conditions stated in connection therewith.

The statements are to be considered as if they had been made by the witness W. A. Wecker in response to questions propounded by Counsel for the Federal Trade Commission in these proceedings, and as supplementing testimony of the witness heretofore given in this proceeding, and covering facts and circumstances either related thereto or within the scope of the examination of the witness W. A. Wecker while on the witness stand.

The first inquiries that were made were made at page 13977 of the record relating to Exhibits 2604, 2605, and 2606.

Now, I think those exhibits were the ones which at that time we thought had been obtained by Mr. C. M. Johnson, representing the Federal Trade Commission, and Mr.

Wecker was asked if he recalled having given them to Mr. Johnson, and he replied that he had not.

I think I have made a pretty thorough report on that so I need not go into any more detail on that, unless Mr. Wooden has something more that he wants to ask. I have searched our records very carefully, and every
19177 way possible, and we can find no record of any kind, shape, or form, that indicates that those exhibits were obtained from the Marquette Company or from Mr. Wecker.

Now, the second inquiry was at page 13998 of the record—

Mr. Wooden: I would like just to say there, if I may—

Mr. Zimmerman: Yes.

Mr. Wooden: —that at that time we thought that Mr. Johnson had obtained them personally, but when Mr. Johnson arrived he explained that he had not.

Mr. Zimmerman: That's right, and we both, I think, have gone into the facts concerning the matter more fully since, and we will probably be able to straighten that out some way.

Then at page 13995 of the record, Mr. Wecker was asked:

"Have you ascertained any more definitely, Mr. Wecker, the dates of your various resignations from or departures from the Portland Cement Association?"

And he answered:

"No, sir; you didn't ask me to do that."

And Mr. Wooden asked:

"Would you check the record or information of your company?"

19178 Then there was an objection and finally we agreed that we would—at pages 13997 and 998—we agreed that we would find out from the Portland Cement Association what their records showed.

Now, I did obtain a letter from the Portland Cement Association with reference to that, whatever their records showed, and did deliver it to Mr. Wooden.

Mr. Wooden: Yes, I know.

Mr. Zimmerman: I think in February, when we returned for these hearings, and I assume that Mr. Wooden will want to offer that in evidence, and we will have no objection to him offering it in evidence if he desires to do

so, except that we do not believe that it is relevant or material to go into that, and we did make our objection to the relevancy or materiality. That is, we think there is no bearing upon any point in issue here on account of our membership in the Portland Cement Association.

19179 Now, at record page 14017, the witness was asked as to what proportion of the capacity of Marquette's Illinois plant was taken up with Illinois highway business during the year 1932. We have made some investigation, and supplementing the answer the witness made at that time after looking up the records, further answer is made that the physical production capacity of the plant of the Respondent Marquette Cement Manufacturing Company at Oglesby, Illinois, in 1932, was upward of 4½ million barrels. That is as nearly exact as we have been able to make it. The witness at that time was not—in Kansas City—was not sure, but thought it might be as much as 5 millions.

Marquette's Illinois highway business that year, as the result of the award of contract made to it on March 1, 1932, amounted upward of 2 million barrels. I could give you, I think, the exact barrelage, but it was substantially 2 million barrels,—within a very few barrels of that. So that the proportion of its physical capacity involved in the Illinois highway business was in the ratio of, we will say, 4 to 9. As to the plant running to capacity that year, which was required, as it did run as nearly as was possible to its full physical capacity, as did also the Cape Girardeaux plant of Marquette, so that Marquette's

19180 shipments for the year 1932 totalled a little bit more than 6,100,000 barrels of cement,—I believe it was 6,141,033 barrels.

The demand for shipments during the year increased more rapidly than the ability of the company to produce and pack ready for shipment finished cement. During the first six and a half months the volume of cement in the bins ready for shipment was maintained from month to month above or very nearly even with the requirements of shipments during any one month, but beginning with the end of July shipping requirements increased so that they greatly exceeded production and the amount remaining in the bins ready for packing and shipment rapidly decreased, so that by the month of October, for all practical purposes, the company was completely out of cement.

In explanation of what is meant by the expression "for all practical purposes", there are a number of storage bins that are approximately 50 feet across at the bottom and when such storage bins become very nearly empty there may be still many barrels of cement in them, but not enough "head" of cement to permit the cement to flow freely to and through the packing machines, without the aid of manual labor distributed through the bins and conveying lines, so that unless there is a sufficient
19181 amount of finished cement in such silos, or bins, the whole process of packing and loading is greatly retarded, and when it gets down to that certain point where it does not flow freely, then they might just as well be completely out of cement for all practical purposes.

Now, as supplemental to the question which was asked by Counsel for the Commission at record page 14021 and 14023, at page 14021 he was asked:

"What conditions of supply and demand warranted the increase of anywhere around 40 cents a barrel in July, 1932?"

Then the "40 cents a barrel" was stricken and the question was reframed so that at page 14023 it read:

"What conditions of supply and demand warranted an increase in the price of cement in July, 1932?"

The witness replied to the first question, not then having an opportunity for investigating the facts:

"Well, now, Mr. Wooden, my recollection is quite hazy about the whole thing. It goes back before I became executive head of this company. I can recall this whole thing, that the whole story was written up in answer to a question of the Federal Trade Commission and submitted to them.

You must have that answer in your files and it will
19182 save a lot of trouble if you will get it out."

I want to point out that copies of the questions and the answer referred to by the witness were produced by the Respondent's Counsel at the hearing in Kansas City while the witness Wecker was still on the stand, the question being a part of the page, the upper part of which was offered in evidence by Counsel for the Commission as Commission's Exhibit 2608, and thereafter the question appearing on the same page, and the answer referred to by the witness, as I have just stated, were offered and received in evidence as Respondents' Exhibits 84 and 85,

but the witness has made further investigation, and to the second question which he said at that time:

"Well, I don't know"—

Mr. Wooden: Your Honor, or Mr. Zimmerman, I would like to point out, I did not ask Mr. Wecker to provide any further information in response to that question.

Mr. Zimmerman: Maybe so, but if the witness were recalled for this further examination, which he would have to be recalled for, the witness would have had a right to state what he found in that regard, and I think we all want to know what those facts are.

Mr. Wooden: Well, if Mr. Wecker were here and submitted himself to cross-examination about it, that
19183 is perfectly all right; but I have not asked him.

Mr. Zimmerman: If you want Mr. Wecker to come in and be subjected to cross-examination on this, I am perfectly willing that he do so; in fact, I am perfectly willing that none of this go in if you prefer, but I—there is very little of it, and I am about to explain what we purchased from others and what others shipped for us.

Mr. Wooden: I asked you that; but I did not ask for any further explanation of the conditions of supply and demand which Mr. Zimmerman now is volunteering.

Trial Examiner Norwood: Well, Counsel may state what he can show,—and what he proposes to show on those points. It is not evidence; his statements are not evidence.

Mr. Wooden: All right.

Mr. Zimmerman: Well, if it is not, then I do not think I shall go any further in the matter, because, as I understand, there is no sense in me digging out these things if they are not going into the record. However, I might read it.

Trial Examiner Norwood: I did not say they are not going into the record; I say, they are not evidence.

Mr. Zimmerman: Well, I think they should be considered as evidence.

I do not care whether any of this goes in or not;
19184 but Counsel has asked me to do a vast amount of research here over a 10-year period, and I have done it.

Mr. Wooden: You have done more than that.

Trial Examiner Norwood: What Counsel has shown there may be received by stipulation.

19185 Mr. Zimmerman: Well, either it all goes in or none of it, and that is the way I am offering the stipulation. "Further supplementing the foregoing answer—

Trial Examiner Norwood: You may put your offer on the record.

Mr. Zimmerman: (Continuing) —it is stated during the latter half of the month of July, 1932, the Respondent Marquette Cement Manufacturing Company gave consideration to sending out quotations for delivered cement from its Illinois plant at prices above those at which it had been selling cement up to that time during the year.

It then appeared that Marquette had committed itself to the sale and delivery of more cement than it could deliver and produce, itself, during the year 1932, and at prices which would allow it a net much below actual cost.

Therefore, in an effort to put a stop to further losses, and in an attempt to establish a price for its product which would enable it, at least, to break even and to avoid being compelled to close its plant or liquidate its business through continued losses, it sent out quotations for delivered cement which would yield it, if sales were made at such quotations, a net return that would at least enable it to break even on sales so made, if any such sales were made.

19186 At Record 14034, the witness was interrogated as to whether or not the Marquette Company ever shipped for other mills, to which the witness replied in substance: "I do not believe the Marquette Company ever shipped for other mills."

Since this question and answer, the witness has made further investigation as to the shipments for other companies; strictly speaking, there were none.

There was, however, in the period between the end of May and the end of September, 1932, an incident which gave the appearance of the Respondent Marquette Cement Manufacturing Company shipping for Dewey Portland Cement Company approximately 45,000 barrels of cement. The facts do not sustain the conclusion, but the facts are that Marquette had sold, substantially, 50,000 barrels of a specific job which required a total of substantially 300,000

barrels of cement; that the Dewey Portland Cement Company had sold the balance of 250,000 barrels of this job.

The job was located on or contiguous to navigable water and it appeared to the contractor to be an advantage to him in his work to have deliveries made by barge. The barge mode of delivery was convenient and cheap for the Dewey Company, but at that time it was inconvenient and more expensive for Marquette than rail delivery.

Therefore, to accommodate the contractor's needs,
19187 and, incidentally, to save itself additional expense and trouble, Marquette relinquished its part of this particular piece of specific job business to the Dewey Company upon the understanding that the Dewey Company would, in turn, arrange to turn over to Marquette some other business which Marquette could handle.

In carrying out this arrangement the Dewey Company took over the unshipped 50,000-barrel portion of the aforementioned 300,000-barrel specific job contract. It was, I believe, at Davenport, Iowa, or so close to it that we may refer to it as being there.

And to compensate for this, bought from Marquette cement to fill unshipped balances of a contract with the Iowa Road Commission which the Dewey Company had theretofore acquired, and thereafter Marquette made shipments upon the Iowa Road Commission's job from time to time in the period between the end of May, 1932, and the end of September, 1932, by which time Marquette's stock of cement was so depleted that it could not continue these or other shipments.

19188 These shipments on this Iowa Road Commission job totalled approximately 45,000 barrels.

I think there was a very few barrels; the record shows a very few barrels less than a total of 45,000.

Mr. Wooden: What was the other job involved? The first job?

Mr. Zimmerman: The first job was the one at Davenport, Iowa, I referred to.

Mr. Wooden: Was that the Iowa Highway Commission business?

Mr. Zimmerman: No, that was a prior contractor where we gave up to Dewey, we released the 50,000 we had sold and they filled out the balance of it, of the 300,000 barrels, and then they bought from us—and, incidentally, the cement which was shipped by Marquette was delivered in its

own bags with the Marquette label on it and Dewey delivered its own cement to the contractor.

Now the record, 14045, Mr. Wooden asked that we look up, as he put it, all years on anything that had been shipped by other companies for Marquette.

Now it is understood and we have operated on this basis, that the information requested include the names of cement companies or mills which shipped portland cement for the
Respondent, Marquette Cement Manufacturing Com-
19189 pany, or for which it shipped from the year 1929
to and including all years since that time or approximately, we will say the last 9 years.

The amount of such shipments, the dates thereof, and the destinations to which such shipments were made.

A careful examination of the records of Respondent, Marquette Cement Manufacturing Company, indicates that the only years from 1929 to 1939, inclusive, which the Respondent elected to and did purchase cement from other companies or in which and which other companies shipped at the direction of the Respondent, Marquette, were the years 1932 and 1936. The further facts relating thereto are as follows:

As to the year 1932—as a result of the Respondent, Marquette, having sold more cement than it was able to manufacture and deliver, and to live up to its contractual obligations with its customers, including the Highway Commission of the State of Illinois, it was impelled to purchase cement from such other companies as were willing and in position to supply it.

During the period beginning with the latter part of July, 1932, shipping requirements were so far ahead of production possibilities that the stock of cement on hand for shipment was very rapidly depleted, and by the month of
October it was completely unable to meet its obli-
19190 gations and it thereupon purchased and secured the
shipment for its account, cement in the quantities and on the dates and to the destinations, as follows:

Purchases made, I have listed first, portland cement purchased by Marquette Cement Manufacturing Company from Alpha Cement Company to fulfill Marquette's contractual obligations to the Illinois Highway Commission during 1932 on account of Marquette's inability to manufacture and ship sufficient cement to fulfill its obligations.

Now I can hand to the Reporter, in connection with this

statement, a list which will show in the left-hand column the date of the shipment and in the next column, on the right, the destination, and in the next column the number of barrels. All of such cement was shipped as directed by Marquette, billed to Marquette, and paid for by Marquette and it was shipped in Alpha's own packages and with their label on it so that there was no attempt to pretend that it was anything else but Alpha's cement.

Then follows a tabulation of portland cement purchased by Marquette Cement Manufacturing Company from Dewey Portland Cement Company to fulfill Marquette's contractual obligations to the Illinois Highway Commission during 1932 on account of Marquette's inability to
19191 manufacture and ship sufficient cement to fulfill its obligations showing, again, the date which began October 17, and ran through various dates in October; then the destinations and the number of barrels in each shipment.

Mr. Paulson: Would you mind reading the totals?

Mr. Zimmerman: Yes; you will find them totalled up.

The amount purchased from Alpha, for example, beginning with October 21 and running to November 7, 1932, was 32,252 barrels, and beginning with October 17 and running through October, the amount from Dewey was 19,508 barrels.

Then, in addition to that, portland cement was purchased by Marquette from Missouri Portland Cement Company to fulfill Marquette's contractual obligations to the Highway Commission of Illinois beginning on October 22; a total of 2400 barrels.

The total number of barrels of portland cement purchased by Marquette from other cement companies to fulfill its obligations to the State of Illinois during the month of October and November 1932, is 54,160 barrels, all of that being shipped under the labels of the companies from whom it was purchased, and all billed to Marquette and
19192 Marquette billed to the State the same price that it had contracted to sell it for but paid to the other companies, the price having advanced, I think, in the meantime, at some of the destinations anywhere from 2 to 16 and, I think, in some few instances, as much as 18 cents a barrel over what it had agreed to sell to the State for, and what it did bill the State for.

Then, in addition, Marquette purchased during the year

1932 from the Dewey Portland Cement Company to fulfill Marquette's contractual obligations to others on other contracts or sales that it had made beyond the Highway Commission, and in addition to that, still buying and paying Dewey and still having it shipped in Dewey packages; on October 22 there were shipments to Blodgett, Illinois, 300 barrels, and another shipment on the 22nd of 250 barrels to 1200 barrels; a shipment to Chicago of 315 barrels and to Ontarioville, Illinois, 900 barrels, or a total of 2965 barrels.

In 1932 Marquette purchased from the Hawkeye Portland Cement Company to fulfill contractual obligations to Marquette's customers on October 21st 132 barrels to be shipped under the Hawkeye label and billed to Marquette at New Hampton, Iowa, and on the same day a shipment to Waterloo, Iowa, of 132 barrels, a total of 264 barrels.

19193 In 1932, beginning with the 22nd of October, Marquette purchased from Kosmos Portland Cement Company, to fulfill Marquette's contractual obligations with four different customers on account of Marquette's inability to manufacture and ship sufficient cement to fulfill its obligations—I have here a list, if you wish it, of the exact dates, beginning with October 22nd and ending with November 15th, and the destination and the number of barrels in each shipment, showing a total of 15,181¾ barrels.

Marquette also purchased from the Medusa Portland Cement Company to fulfill Marquette's contractual obligations, which it was unable to ship, to a single customer in 1932, shipments which were made on October 21, 22, 24, and 25 to Marseilles, Illinois, a total of 2,674¾ barrels, all of that being billed to Marquette and being shipped, however in Medusa packages.

Marquette purchased again from Medusa in 1932, to fulfill orders which it was unable to ship for itself, on October 21, to Pecatonia, Illinois, 132 barrels; to Normal, Illinois, 132 barrels, and Joliet, Illinois, 52 barrels, and 80 barrels, respectively, and on the 22nd of October, to be shipped to Waukegan to a Marquette customer 50 barrels and another shipment of 100 barrels and, on the same

19194 day, a shipment to Toledo, Ohio, of 250 and one-half barrels, or a total of 796½ barrels.

From the Missouri Portland Cement Company, to fulfill orders other than Road Commission orders, in 1932 Mar-

quette purchased, beginning on September 19, 1932, and going through to the 2nd of December, various shipments totalling 5,955½ barrels and I stand ready to show the details of each date and each destination and each shipment, if you like.

Mr. Wooden: Yes; I understood you were going to turn all that over to the Reporter; that detail.

Mr. Zimmerman: The only year since 1932 during which Marquette was compelled to purchase cement from other companies was the year 1936.

During the year 1936 a plant condition developed at the Oglesby, Illinois, plant being the principal plant of the Respondent, Marquette Cement Manufacturing Company, which had 2 mills which we will refer to as mill No. 1 and mill No. 2.

Extensive repairs that were required on mill No. 1 and a great deal of equipment from mill No. 2 was removed for this purpose so that mill No. 2 was not in operating condition.

The company had underestimated, at the beginning of the year, the amount of cement that it would sell and
19195 that it would be required to deliver during the year 1936 and had installed a rock wool plant in its mill No. 2. No provision had been made to operate mill No. 2. There was no coal mill for pulverizing coal and so forth and on account of this situation the physical production capacity was greatly reduced and the Respondent again found itself in a position where it was obligated to deliver cement more rapidly than it could produce it.

Therefore, from May 27, 1936, to October 26, 1936, Marquette purchased 18,020 barrels of portland cement from the Alpha Portland Cement Company to fulfill Marquette's obligations to a single customer at Aurora, Illinois.

Let me add there was no pretense of this being anything else than our competitors' cement. We just simply bought it and delivered it.

From May 28, 1936, to October 17, 1936, Marquette also purchased, from Alpha Portland Cement Company for a single customer at East Peoria, Illinois, 10,902 barrels of portland cement.

On June 5 and 6, 1936, Marquette purchased from Alpha Portland Cement Company 18,000 barrels of portland cement for a single customer at West Lake Forest, Illinois.

19196 The Alpha plant is located very close, as the record may or may not show, to the Marquette Oglesby plant.

On September 1, 1936, Marquette purchased from the Alpha Portland Cement Company, 10,864 barrels of portland cement for a single customer at Arlington Heights, Illinois.

From June 4, 1936, to June 23, 1936, Marquette purchased from Alpha 8100 barrels of portland cement for a single customer at Kentland, Illinois.

There may be an error; that may be Kentland, Indiana.

From June 5, 1936, to July 31, 1936, Marquette purchased from Hawkeye Portland Cement Company 9609 barrels of portland cement for a single customer at Keosauqua, K-e-o-s-a-u-q-u-a, Iowa.

From June 4, 1936, to August 25, 1936, Marquette also purchased from the Hawkeye Portland Cement Company 50,152 barrels of portland cement for a single customer at Montezuma, Iowa, Witmer, Iowa, and Malcolm, Iowa.

From October 21, to October 24, 1936, Marquette purchased 1200 barrels of portland cement from Medusa Portland Cement Company for a single customer at Wilkinson, Illinois.

From September 24 to October 20, 1936, Marquette
19197 also purchased 6600 barrels of portland cement from Medusa Portland Cement Company for a single customer at Clare, C-l-a-r-e, Illinois.

From September 21 to September 26, 1936, Marquette purchased 1800 barrels of portland cement from Medusa Portland Cement Company for a single customer at Sepona(?), Illinois.

From September 14 to October 9, 1936, Marquette purchased from Medusa Portland Company 3000 barrels of portland cement for a single customer at Manteno State Hospital, Illinois.

From August 14, to September 26, 1936, Marquette also purchased from Medusa 2600 barrels of portland cement for a single customer at Waukegan, Illinois.

From June 8, 1936, to August 26, 1936, Marquette purchased 28,500 barrels of portland cement from Medusa Portland Cement Company for a single customer at West Lake Forest, Illinois.

From November 23, to December 16, 1936, Marquette purchased from Missouri Portland Cement Company 6,745

barrels of portland cement for a single customer at Gilmore, Missouri.

From June 5, 1936, to June 24, 1936, Marquette purchased from Northwestern States Portland Cement Company 14,025 barrels of portland cement for a single
19198 customer at Lime Springs, Iowa.

From August 13 to November 17, 1936, Marquette purchased from Wabash Portland Cement Company 5,456 barrels of portland cement for a single customer at Fortville, Indiana.

At record 14033 the witness was asked this question, the witness Wecker: "How was the matter of price handled in those shipments by other companies? Did they just take over the same destination price obligations that you had assumed in the first place?

To which it appears that the witness replied, in substance, as follows:

"Yes, as far as the—"

On page 14034 of the record, Mr. Wooden

"Yes, as far as the State was concerned. The destination cost to the State was the same as before."

The witness desired to supplement this answer by stating that upon investigation he has determined that Marquette, in living up to its contractual obligations, in cases where it was unable to produce sufficient cement, purchased outright from other companies the cement required, paying the other companies the current market price thereof and itself billing its own customers at the price which it had previously contracted to sell them delivered cement.
19199 Mr. Wooden: I just want to point out—

Mr. Zimmerman: Yes.

Mr. Wooden: —That there, again, you are adding some information that I did not actually ask for.

Mr. Zimmerman: That is all true, but I am tendering this as a stipulation voluntarily made, and I think we have spent a lot of time in trying to dig this information up for you, and we want our record clear for it.

Mr. Wooden: Well, I did not ask for this as a stipulation.

Trial Examiner Norwood: Well, Counsel is not through?

Mr. Zimmerman: Not yet.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: Inasmuch as the prices of delivered

cement at certain destinations had increased in October, 1932, beyond the price at which it had previously agreed to sell and deliver cement at such destinations, it did, in some instances, pay anywhere—I think I have stated the amounts it paid—from two to as much as sixteen or eighteen cents a barrel, or more, and they delivered that to its customers.

Now, I have this suggestion, if a stipulation is agreeable to Counsel, I am perfectly willing that the statement be included in the record, as I have stated it, and
19200 I will furnish to the Reporter the details, and I will be glad to exhibit to Counsel supporting data to show that these figures are correct.

Mr. Paulson: I did not hear whether or not you gave a full answer to the question in this respect,—the question put by Mr. Wooden in this respect—I do not recall whether you said Marquette made any shipments for the account of other companies.

Mr. Zimmerman: I gave all the facts regarding that.

Mr. Paulson: During 1936, then Marquette shipped no cement at all?

Mr. Zimmerman: No, we have only one instance where there was even the appearance of that, and that I have explained in my proffered stipulation here.

Trial Examiner Norwood: There were cases where Marquette shipped to other concerns?

Mr. Zimmerman: No; most of them were cases where Marquette bought—

Trial Examiner Norwood: Bought.

Mr. Zimmerman: —cement from other concerns to fill its obligations.

There was but one instance where I related about Marquette shipping some cement out in Iowa.

Trial Examiner Norwod: I see.

Mr. Zimmerman: Where there was a shift of
19201 business between the two companies.

Mr. Wooden: Well, I just want to say, again, that in requesting the information that I did request, I did not envision the possibility that it would be offered in the form of a stipulation. I wanted the information without any regard to whether it was a stipulation or not, and Counsel has seen fit to incorporate in the information certain things that were not asked for, and wants me to agree to stipulate to the whole of them, and without any— In

other words, he wants me to waive the request that I made for the information that he has now provided and submits it conditionally.

Mr. Zimmerman: I am not.

Trial Examiner Norwood: Well, he has furnished this information, and it is on the record, and not in the form of evidence, as a statement for Counsel, and with Counsel's permission he may look over it and see if he wants to—

Mr. Wooden: At any rate, I would like to consider the matter further.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: I have no objection to it.

Mr. Wooden: With regard to the proposition of a stipulation, and consider the details of the information provided and which are to be, as I understand it, incorporated in the record.

19202 Mr. Zimmerman: That will be if the stipulation is agreeable to you, and I will be very glad, indeed, to sit down with you, or one of your associates, and go into as much supporting detail as we can.

Trial Examiner Norwood: Yes.

Mr. Wooden: Well, the details that I referred to are not that which you indicated to the Reporter would be copied into the record.

Mr. Zimmerman: Well, the detail that I refer to is everything that I have stated, and it is offered as a whole and not piecemeal.

Trial Examiner Norwood: I understand.

Mr. Zimmerman: Now, that is the size of that.

Mr. Wooden: Well, I shall want to consider—

Trial Examiner Norwood: You will want to consider the matter.

Mr. Wooden: I shall want to consider the matter in the detail in which it is offered before committing myself on any proposed stipulation.

Mr. Zimmerman: I can give you, if necessary, the detail any time, exactly as to how much was in our bins at any time during any of these periods. I have had that all tabulated.

19203 Mr. Wooden: Your Honor, at this time I would like to make a statement and inquiry.

There was served on the Secretary of the Dewey Portland Cement Company a subpoena duces tecum returnable here this morning at 10 o'clock calling for the production of certain described papers and documents.

The subpoena gave the option of personal appearance of the mailing of the required papers to Your Honor or the production of the papers here, under certain conditions.

I should like to inquire whether there is anyone here from the Dewey Company or whether—what steps have been taken to comply with the production of the papers through Counsel.

Mr. Leisure: Mr. Wooden, they have sent them on here in accordance with your request and asked that we turn them in. They have not sent anyone. They will, if you want them, but they apparently didn't feel the necessity of it.

I would like to turn them in, Your Honor, with the understanding that these papers will be returned. These are original invoices, here, and original records of the Dewey Company, and I would like to turn them in 19204, with the understanding that they will be returned.

I would say that as to two of the years they have sent invoices, but going back of that, 1935 and 1936, the original invoices were here but for 1934, back of that, they have sent you the original ledger sheets because they didn't keep invoices back that far.

Mr. Wooden: I would suggest the papers now produced be marked for identification by the Reporter.

Trial Examiner Norwood: They are all bound together, are they?

Mr. Leisure: What arrangement can be made, Mr. Wooden, so that we will both have copies and so that the copies can be substituted for the originals so that the originals can go back to the company?

Mr. Wooden: That is easily arranged. The Reporter's number for identification will go on these original papers, however.

Mr. Leisure: And then the photostats will be substituted for the original?

Mr. Wooden: Yes.

Mr. Leisure: That is all right.

Mr. Zimmerman: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Back on the record.

19205 The papers which have been produced here through the Counsel may be marked Commission's Exhibit 3093-A to blank, for identification.

Mr. Zimmerman: Let me say one thing more, for the record, with reference to the stipulation that I offered to Mr. Wooden.

I am not asking that Mr. Wooden stipulate anything else than that the witness, if he were called, would have so testified.

19206 In other words, I am not asking him to stipulate to the truth of any of the statements made therein at all but that the witness would simply so testify and then I do offer to Mr. Wooden to dig out for him the supporting data which will substantiate any statement of fact that is made.

Mr. Wooden: Thank you.

JOHN P. SIMPSON thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Wooden.

Q. Mr. Simpson, since you appeared here as a witness last week have you had any contact with any representative of any cement manufacturing company?

19207 A. Mr. John J. Clous, who represented himself to be the assistant traffic manager of the Lehigh Portland Cement Company of Allentown came in our office, or came to the public file room of the Interstate Commerce Commission on Friday.

He made a request of the—

Q. Last Friday?

A. Last Friday; yes, sir.

He made request of the attendant in charge of that room for certain tariffs, many of which happened to be on my desk.

She sent one of her assistants to my desk to know if they could borrow them.

I went back to see if he actually needed them for his work because I was using them for other purposes not material here and he said that he had a copy of the transcript, so we got to talking about this case and he identified himself as being with the Institute—or with the Cement Company and stated he had been asked to re-check my figures.

Q. In connection with your testimony?

A. In connection with my testimony.

He had the transcript with him.

Q. State whether or not you had any conversation with him regarding the use to which the Institute's freight

19208 rate books and correction sheets were put.

Mr. Leisure: If Your Honor pleases, I object to this. I think it is not material or relevant to any of the issues. Furthermore, Mr. Wooden tendered this witness for cross-examination and he is now taking him up on direct examination on matters that seem to me to be immaterial. A man was sent from the traffic department from one of the companies to check over figures which he offered here in evidence. If we can go into that sort of thing, this case will never end.

Trial Examiner Norwood: Well, if he has made any statements here that are relevant to the inquiry, he may bring those out, I suppose.

Mr. Leisure: I don't know. If he is working for Counsel and checking the figures here, I don't know that that is binding upon anybody. I don't think it is proper procedure; I think it is wasting time, and I object to it.

Trial Examiner Norwood: Objection overruled.

Mr. McFadden: I would like to object on the ground of entrapment.

Trial Examiner Norwood: Of what?

Mr. McFadden: On the ground of entrapment. I just would like to note on the record that objection, but I will be glad to expand at the appropriate time.

19209 Mr. Wooden: I don't see any entrapment involved. This is something that happened last week and it didn't happen until after the close of the witness' testimony last week, but I submit its relevancy and materiality will appear.

Mr. Leisure: It can't be an admission by a co-conspirator in the pursuance of any conspiracy because if the representative of the Respondent, one who admits, whatever the proper name is, is supposed to have admitted something, is sent there by Counsel, I don't see how anything he says is binding upon some company.

We are getting way off the record here, Your Honor.

Trial Examiner Norwood: I don't know what it is he wants to bring out, but I can tell more about its relevancy when it does come out, and in order that it may come out I shall overrule the objection.

Do you wish the question read?.

The Witness: Yes.

Trial Examiner Norwood: Read it.

(Question read as follows:

"Q. State whether or not you had any conversation with him regarding the use to which the Institute freight rate books and correction sheets were put?")

A. I got to talking to him about the cement industry, in a general way, and about the Cement Institute, of which I frankly knew nothing. I asked him the
19210 function of The Cement Institute. He said it was a traffic bureau for the Bureau.

I said, "Do they audit traffic bills?"

He said, "Oh, no, that is done by the individual lines —individual industries," I should say. He said, "the only purpose of The Cement Institute is to issue these rate books which serve as price books."

Cross-Examination.

19212 By Mr. Leisure:

19213 Q. Mr. Simpson, on this exhibit, this tabulation, Commission's Exhibit, for identification, 3048-A, B, C, D, E (handing documents to witness), I notice that it is headed "Transportation rates on cement in carloads."

A. Yes, sir.

Q. Who prepared this tabulation, Mr. Simpson?

A. To give its complete history, Mr. Hugh White
19214 of the Federal Trade Commission furnished me with a statement, stating what he alleged to be the rates shown in the rate book, and captioned herein as "Initial Rate Data"; also, the figures shown in the correction sheets and here shown as correction sheet data.

Each of these sheets, he explained to me, were shown as changes effective at once. In view of my prior testimony, which is no doubt fresh in the minds of the Counsel, that the I. C. C. does not permit the filing of freight schedules effective at once, except under Section 22, which is not material here, how the changes could have been effective at once, he suggested that I make a check of the tariffs. I did make a check of the tariffs and gave the results of my testimony in my previous hearing.

Briefly summarized, the changes shown by the correc-

tion sheets represented, in most instances, correction of error in the rate book.

Q. Would it be correct to say, Mr. Simpson, that the left half of the page, up to where it says "Data to be supplied from the files of the Interstate Commerce Commission," was prepared by Mr. White and submitted to you, the left side of the page, and the right side was prepared by you—is that correct?

A. That is correct, sir.

19215. The Witness: I did not testify—I did not refer to any figures on the left of this center line.

By Mr. Leisure:

Q. That is right, and the center line being where it gives the names of certain towns, starting Kansas City, Mo., on the first page A.

A. That is correct, sir.

Q. Yes, and it gives shipping points all the way down the center.

A. That's correct, sir.

Q. And you did not prepare any of the data that is to the left of that line?

A. No, sir; I assume no responsibility for its accuracy.

19216 Q. And then when you say you did not testify to any statement to the left of the line, Mr. Simpson, that not only applies to page 3048-A, but it applies to 3048-B?

A. B, C, D and E.

Q. B, C, D and E?

A. Those figures which Mr. White showed were shown —the only use, I mean, of them, was to get the dates from which I checked on it, I checked the rates—that is, I checked the rate from Kansas City, Mo., to Winthrop, Iowa.

Q. That is right.

A. On—

Q. On that date?

A. On that date, and on this date.

Q. Yes.

A. And during the period intervening.

19217 Q. Yes. So by means of this tabulation, Mr. White pointed out to you the shipping points and destinations which he wanted you to check?

A. Yes, sir.

Q. Now, as I understood you, Mr. Simpson, having received this tabulation from Mr. White, you did not personally go through this group of correction sheets yourself, or through all of the rate books in order to get these figures—you relied on Mr. White's statement?

A. I disregarded those figures.

Q. You relied on Mr. White's statement?

A. No.

Mr. Wooden: No, his testimony—

The Witness: I relied on the tariffs.

Mr. Wooden: His testimony was—

By Mr. Leisure:

Q. You are talking about the figures you put down?

A. I made—my stenographer copied these as shown by Mr. White, without a check on my part whatsoever (indicating).

Q. Yes, yes. You are now referring to the ones on the left side—

A. On the left side.

Q. —of the page?

A. I am referring to the figures shown as freight data published by The Cement Institute, freight rate booklet; that information was furnished me by Mr. White 19218 of the staff of the Federal Trade Commission, and with the exception of the dates shown therein was disregarded by me.

Q. When you say those are the ones you used on "A," is that also applied to A, B, C, D and—

A. And E.

Mr. Wooden: E does not contain any figures.

The Witness: A, B, C, D.

By Mr. Leisure:

Q. Yes, A, B and C, isn't it?

A. Yes.

Q. I am not sure whether I asked you whether or not you checked—did you look for other correction sheets throughout all of these correction sheet books?

A. No, sir.

Q. You used these figures here (indicating)?

A. I didn't see many, if any, of those rate books, nor did I see any of the correction sheets until they were handed me on the witness stand.

Q. All right.

Now, that explains Commission's Exhibit 3048-A, which you used.

Take, for instance, 3049, for identification (showing data to witness). Who selected those points for you? Did you select them or did someone select them for you?

19219 A. Mr. White called me up by telephone and read the list of the origin points, El Paso, and the list of destinations, and asked me to check the rates to those points.

Q. Yes.

Now, as to Commission's Exhibit 3051-A (showing document to witness), will you explain that, please? How was that prepared?

A. During the course of an interview with Mr. White he stated that the history of the emergency charges might be necessary, for some purpose of the Federal Trade Commission—what, he did not state. He asked me to review the emergency charge situation in its entirety.

Q. What is the number of that, Mr. Simpson?

A. 3051-A.

Q. For identification.

Now, look at Commission's Exhibit 3052, for identification (showing document to witness). It is a statement containing eight pages which are not numbered. Would you explain that, please?

A. This again originated in a telephone conversation.

Q. With whom.

A. Mr. White called me and stated that he understood that there were certain changes shown in supplements Nos. 23 to 34 of Speiden's I. C. C. No. 1626, in connection with the rates from southern points to Sheffield, Ala.

19220 He asked me to prepare a statement showing those rates, and not knowing what points he had in mind I prepared a statement showing all of the rates from Alabama, Tennessee, and Missouri to Sheffield, and the changes shown in connection therewith.

Q. And that is the tabulation you used with respect to that?

A. Yes.

Q. When you testified on the stand?

A. Yes.

Q. Now, take Commission's Exhibit, for identification,

3050 (handing document to witness); under what circumstances was that prepared?

A. This again originated in a telephone call. He called me and asked specifically for the rates from Security, Md., to the four destinations, Sundbury, Maysville, Rockford, and Weldon, and from Martinsburg to Roduco and Travis, under dates of February 1, 1936, and February 1, 1937.

Q. And this one here (indicating) which says "January 31"—what is it, 1934?

A. This is a sheet 8 of the Sheffield tabulation, Mr. Leisure. It was added in this building, after I discovered that that period was involved.

Q. That would be properly marked, then, Exhibit 3052, would it, Mr. Simpson?

A. 3052 and a letter.

19221 Q. Will you be good enough to look at Commission's Exhibit 3055, for identification, A and B, and tell us how that was prepared (handing document to witness)?

A. This is a second sheet of the 3055 file. Have you the first exhibit? This is the "A" file. The file preceding this,—do you care to have this?

Q. I beg your pardon.

A. This is the second half of 3055. Do you want the first half first?

Mr. Wooden: It is "A."

Mr. Leisure: Marked "A."

Have you got the first half, Mr. Wooden?

Mr. Wooden: No.

The Witness: May I identify it, Mr. Leisure?

By Mr. Leisure:

Q. Now, do you say that that exhibit, for identification, 3055 is in some way connected with the Exhibit 3056, for identification, Mr. Simpson(indicating)?

A. I understand it is. The circumstances of preparing it were substantially the same. Mr. White, on about the 20th of January of this year, asked me to prepare a

19222 statement showing the short-line route from Bonner Springs, Kansas, Sugar Creek—Bonner Springs, Kansas, and to Luther, Iowa, and Perry, Iowa, and the other points shown in this statement. Also to show

whether those short-line routes operated through Des Moines, Iowa.

In order to ascertain the short-line routes, it was necessary to take the tariff, check the rates, ascertain by what routes that rate would apply, and figure the distances over again of these routes.

Q. What was the purpose of this? Were you told the purpose, Mr. Simpson?

A. No, sir.

I found that there were anywhere from two to forty routes in connection with each rate. I checked the routes and the distances and furnished them as requested. A similar request—I am speaking of 3056 in my testimony—a similar request was made shortly before my appearance the other day, last week, in connection with rates from Mildred, Kansas, to Perry, Iowa, and certain other rates from Mildred and Humboldt, and Mr. White suggested that I use the February 1, 1939, data so as to keep it the same as the prior statement, as only a day or two elapsed before Mr. Wooden expected to put me on the stand, I advised him it would be impossible for me to check up distances in connection with each route, but I could check up the routes over which the rates applied, and
19223 ascertain if what appeared to be reasonably short routes from the maps were included in those routes, and those routes are shown in Exhibit 3055-A and B.

Q. In other words, as I understand you, this Exhibit 3056 is your work prepared from the official—

A. This is my work here (indicating on exhibit).

Q. —from the official records?

A. Yes.

Q. Which you used when you testified the other day?

A. Yes, sir.

Q. Are these all of the documents now? Do we have them all, which you used when you testified?

A. I couldn't say as to that. I cannot now check; but I gave you—gave Mr. Wooden everything that I had.

Mr. Wooden: I think it is all.

By Mr. Leisure:

Q. I have a notation here of 53 and 54. I do not seem to have that, Mr. Simpson.

Mr. Leisure: Mr. Wooden, do you have the data for five and six?

Mr. Wooden: The only thing Mr. Simpson used is the thing I thought you had. I did not get the number of it, rates for transportation of cement (handing data to Mr. Leisure). I thought you asked him about that.

Mr. MacIntyre: Off the record.

19224 Q. Then, Mr. Simpson, as I understand your testimony, in each case the destination point and the shipment point was called to your attention by Mr. White?

A. And the date.

Q. And the date?

A. Yes.

Q. And you personally did not select them out of the correction sheets, or out of the rate book?

A. I had no knowledge whatsoever other than that furnished me by Mr. White as to what the rate books and correction sheets showed.

Q. You understand, do you not, Mr. Simpson, that these so-called correction sheets in most instances are not correction sheets at all but merely supplements, do you?

A. That was my understanding; yes, sir.

Q. Now, in order that we may select these exhibits, when you used the correct I. C. C. rate for the various destinations on your direct examination, which of these papers did you use? What is the exhibit number, so that we may refer to it?

19225 Q. Mr. Simpson, I am not sure that you understand my question. What I am trying to do now is to simply find out which one of these exhibit numbers—and you can tell me what the number is—you used when you gave the correct I. C. C. rate.

Is this the number here,—3048 (indicating to witness)—

A. 3048-A, B, and C.

Q. Thank you very much.

A. Also one other sheet, Mr. Leisure.

Q. Do you know what it was?

A. 3052 (referring to data).

Q. 3052. Thank you.

That would be 3052-A to I?

A. Yes, sir—not all of those pages, however, referred to the rate book.

19226 Q. Well, referred to,—I understand.

Now, as I understand you further, then you per-

sonally prepared the right side of Commission's Exhibit 3048-A, B, and C from the official tariffs, yourself?

A. Yes, sir.

Q. Now, as I recall, Mr. Simpson, in checking one of Mr. White's figures which he submitted to you, namely, the New England rate book No. 4—

Mr. Leisure: Page 18927 and 28 of the record, Mr. Wooden.

Q. (Resumed) —you were given a rate of 31½ cents from York, Pa., to Hampstead, New Hampshire.

Which paper will show that to you, as to whether you said that or not, Mr. Simpson (handing documents to witness)?

A. If I said 31½, I made a mistake, or else the stenographer did not catch me correctly.

The rate which I intended to testify as being shown from York, Pa., to Hampstead ,H-a-m-p-s-t-e-a-d, N. H., was 21½ cents in force on November 14, 1937, and 24 cents in force on March 28, 1938, with certain changes in between that date.

Q. So, in order to get the record straight this morning (however it happened, the rate book does show 21½ cents and not 31½ cents, is that not so, Mr. Simpson?

19227 A. I haven't got the rate book in front of me.

Q. Just look at it, will you please?

Mr. MacIntyre: It is this book (showing document to witness).

Give the exhibit number when you start your answer.

A. All right. Exhibit No. 1110-R, the New England Rate Book No. 4, on page 37, shows the rate of 21½ cents, which was checked by me as being in force on the date of the rate book.

By Mr. Leisure:

Q. Yes.

Now, on page 19827, I have here "Answer" on the record,—"Effective July 1, 1935, the rate book shows a rate of 31½ cents from York to Hampstead."

As I understand you now, the correct figure should be 21½ cents?

A. That was what I intended to say.

Q. Very good.

Mr. Leisure: Now, on the same page of the record, Mr. Wooden.

By Mr. Leisure:

Q. On the same page there appears as of April 5, 1938, the rate from York to Hampstead as 24 cents; do you recall that?

A. That perhaps should be August 5th.

Q. Now, did you examine the Pennsylvania Railroad Tariff, I. C. C. 1622, in connection with that?

19228 A. Let me see,—Hampstead, 1622; yes, sir (consulting data).

Q. Yes, sir.

And that does show, does it not, that it was August 5, 1938, Mr. Simpson?

A. No, sir; it showed—

Oh, yes, it shows that the rate on March 28, 1938, became 24 cents.

Q. Quite right. And it shows also, does it not, that on August 5, 1928, it was 24 cents plus 83 cents per ton, or 28.15 per hundredweight.

You have not got it there in front of you, have you, the Pennsylvania Railroad Tariff?

A. I haven't got it in front of me; no, sir; I will be glad to check that, and—

Q. Will you check that and if I am wrong will you correct the record on that?

A. Yes, sir.

Q. Perhaps if I read it over again. It shows also, does it not, that on August 5, 1928, it was 24 cents plus 83 cents per net ton, or 28.15 per hundredweight?

A. The stenographer will give me an extra copy of that sheet, won't you?

The Reporter: Yes.

By Mr. Leisure:

Q. Was this rate shown in the Institute correction sheet?

19229 A. The Institute correction sheet August 5, 1938.

The Witness: The Commission's Exhibit 3026-TTTT shows that the rate issued August 5, 1938, and effective at once was 28.15 cents.

By Mr. Leisure:

Q. Yes, sir.

Now, that is the rate that is shown in the Institute correction sheet on August 5?

A. On August 5; yes, sir.

Q. Yes, sir. Now the original rate on July 1, 1935, we have decided was 21½ cents per hundredweight.

A. That is what my notes indicate, and it is my belief it is correct.

Q. Isn't it a fact, Mr. Simpson, that that remained in effect until November 14, 1937, under the Pennsylvania tariff, I. C. C. 152?

A. Let us see (referring to document).

November 14, 1937, is the date I have shown in my notes.

Q. You have shown, or have not?

A. I have.

Q. So that that is correct, is it?

19230 A. Yes, sir.

Q. Yes, sir.

Now, was the tariff, I. C. C. 152, canceled by Pennsylvania Railroad tariff, I. C. C. 1622, effective August 1, 1936?

A. Yes, sir. I don't have the date of the cancellation in my memory, but it was along about that time.

Q. So, as a result, then, if I understand you correctly, as a result of the cancellation of I. C. C. 152 it could not have applied during any period in 1937 since the 1662 became effective in August.

A. I don't remember the date of that cancellation and would not like to answer, definitely, until I check on that.

Q. Perhaps we can save time and approach it this way—and you will correct me if I am wrong—if it should appear 1622 became effective August 1, 1936, canceling 152, it would not be effective in 1937; that is, 152.

A. That is correct, sir.

Q. Yes, sir.

Did your research show that the rate from York to Hampstead was changed June 15, 1937, from 21 1/2 cents plus 75 cents per net ton, or 25.25?

A. If I found that I failed to make a record of it. I do not recall having found that, and it may be that the tariff would show that and that I overlooked it.

19231 Q. Will you check that and tell us if that is wrong?

A. I would rather, if His Honor will permit, check that.

Q. Can you do that over the noon period?

A. I can do that and have it back by 2 o'clock.

Q. Now, from November, 1937, through March 27, 1938, the rate from York to Hampstead was 27 1/2 cents per hundredweight, wasn't it, Mr. Simpson?

Mr. Leisure: Page 18928 of the record, Mr. Wooden.

A. The rate from November 15, 1937, through March 27, 1938, was 22 1/2 cents a hundred.

Q. Yes, sir.

A. As shown in I. C. C. 152 and 1622.

Q. That is correct.

Now, does the Pennsylvania Railroad Tariffs indicate that the rate on November 15, 1937, was 22 1/2 cents plus 75 cents per net ton, or 26.25 cents per hundredweight, Mr. Simpson?

A. I do not recall the 75 cents per ton to which you allude.

By Mr. Leisure:

Q. Is there some way you can check that?

19232 A. I will be glad to have the tariffs in court this afternoon if there are not too many of them. I say, I will be glad to; I presume the Secretary of the Interstate Commerce Commission will permit it. The tariffs are, legally, in his custody.

19233 The Witness: Your Honor, before starting, I wish to correct this statement made in the transcript of April 6, page 18965, lines 9 and 10: On line 9, change the period to a comma, and on line 10 use the lower case "f."

And on page 18927, line 10 and line 17, I wish to call attention of Your Honor to the fact that in both cases the rate from York to Hampstead is shown at 21 1/2 cents and not 31 1/2 cents.

19238 By Mr. Leisure:

Q. Were you going to get something that you wanted to correct, over the noon hour?

A. I got, at your request, the public file copy of Pennsylvania Railroad Cement Tariff 1473-A, I. C. C. No. 152 and their freight tariff 1473-B; also a cement tariff I. C. C. 1622.

In response to the inquiry which you made as to when I. C. C. 1622 cancelled 152—

Q. That is right.

A. —that date was August 1, 1936.

Q. Yes, sir; that is correct.

Now, isn't it a fact that the—had you finished? Excuse me.

19239 A. I was going to say there were certain questions were asked me this morning but I have forgotten what they were and I was going to ask you to repeat them.

Q. I don't know the exact questions, Mr. Simpson, but the subject-matter was this: That the Pennsylvania Railroad tariff of August 5 was I. C. C. 1622?

A. Yes, sir.

Q. Was it not?

A. Yes, sir.

Q. And that was based on 24 cents—

A. You are speaking of August of which year?

Q. 1938.

A. 1938 was 1622.

Q. Quite right.

And that was based, was it not, on 24 cents plus 83 cents per ton?

A. No, sir.

Q. All right. You tell us what it was.

A. The rates shown in—there are two rates shown in I. C. C. 1622.

One is for delivery by the Boston & Maine Railroad and one shown on page 126 of the original tariff, Station 188, as 21 1/2 cents.

In supplement No. 39, effective March 28, 1938, there is a table, reading only the pertinent portion of the
19240 caption, "Where the rates shown in Column 1 are the same as the rates published in pages 179 to 397, original tariff, apply rates shown in Column 3."

One of the figures shown in column 1 is 21 1/2 cents.

Opposite thereto, in column 3, there is a figure "24 cents", which means that on March 28, 1938, the rate via all rail routes from York to Hampstead was shown at 24 cents.

Q. Now, Mr. Simpson, if you have finished with that will you please be good enough to look at Supplement 22?

A. I was just about ready to explain the 28.15 rate, which appeared in the tariff.

Q. Yes.

A. Effective March 15, 1938—no, earlier than that;—

Q. Look at June 15, 1937.

A. That is what I am looking at, now.

Effective June 15, 1937, there was established a rate in the tariff for delivery via the Boston & Maine Transportation Company to Hampstead, New Hampshire, of 21 1/2 cents plus 75 cents a hundred pounds, making a rate of 25.25.

Q. You mean 75 cents per ton, don't you, Mr. Simpson?

A. Seventy-five cents per ton of 2,000 pounds, I should have said, making a rate equivalent to 25.25.

I believe I am correct in that figure.

On March 28, 1938, the rate was 21 1/2 cents, as 19241 heretofore stated—I want to correct my previous testimony.

This tariff was placed in my hands just a few minutes ago, and I see Hampstead on the Boston & Maine was cancelled March 15, 1938. I had overlooked that when I made my previous tabulation.

Q. So, to save time, Mr. Simpson, I am not interested in how you did it; I am sure you did it properly; the correct rate is 28.15 and that rate is shown by the correction sheet?

A. That was shown on a later date, I believe, by the correction sheet.

Q. Well, the correction sheet—the record will speak for itself as to the date on the correction sheet.

Trial Examiner Norwood: How much later is it?

By Mr. Leisure:

Q. In your testimony—

Trial Examiner Norwood: Let him answer my question.

The Witness: My recollection is it was some four or five months later.

By Mr. Leisure:

Q. That correction sheet is dated August 5, 1938, isn't that correct?

A. I couldn't say as to the date. I haven't got it in front of me, but about that date.

Q. Now you stated, on July 1, 1935, that the rate was 21 1/2. I think we went over that this morning, didn't we?

19242 A. I agreed as to the 21 1/2 and the record bears me out. That was what I testified.

Q. Yes. And that remained in effect through November 14, 1937, didn't it, Mr. Simpson?

A. Except as modified by the tariff of emergency charges; until November 15, 1937.

Q. November 14, you mean?

A. Yes, that was the closing date; November 14.

Q. And then it was modified by I. C. C. 152. We have been over that.

A. It was modified on November 15, 1937, by a supplement to 152—no, to 1622.

Q. 1622.

A. Yes, sir; in response to the authority granted in ex parte 115.

Q. So, then, as you testified—in order to get the record correct—as you testified, and your testimony now stands, on November 15, 1937, the rate was 22 1/2 cents plus 75 cents per net ton, or 26.25 cents, is that correct?

A. On November 15, 1937, the rate was 22 1/2 cents plus—

Q. —75 per net ton?

A. Now let me verify that 75 cents, on that date.

Q. Look at Supplement 22, Mr. Simpson.

A. I did, but I want to see if there is any later supplement that modified that.

19243 (The witness referred to documents.)

A. (Continuing) Plus 75 cents per ton of 2,000 pounds as shown in Supplement 22 and brought forward without change in Supplement 36.

Q. Quite right. And that rate, as you have now stated, is the correct rate, was stated in the correction sheet when it was issued?

A. I couldn't tell you as to what was stated in the correction sheet on that date.

Q. Well, in your original testimony with respect to that, you failed to take into consideration that, then?

A. I failed to take into consideration the cancellation of the station on the Boston & Maine Railroad as shown in the index to the supplement without showing the body of the supplement under that railroad.

19244 Mr. Leisure: That is right.

By Mr. Leisure:

Q. Now, do you recall in your testimony there was some question about whether or not you could check Laramie to Hawks and Turquoise, N. M.?

I think you said you were unable to check that, and I think you also stated that this might be due to some combination rate of which you were not aware.

Do you recall that?

A. I do not recall unless I have my notes before me. I could not—

Q. Would you like to have those notes, also?

Mr. Leisure: Mr. Wooden, would you give him all those papers that he had this morning?

Mr. Wooden: Yes (handing documents to the witness). (Witness examines data.)

A. Laramie to Hawks and Turquoise, N. M., I was unable to check the rates of 45 cents and 55 1/2 cents shown by the Institute. I did find that—

By Mr. Leisure:

Q. You say you did find; what tariffs did you use, Mr. Simpson?

A. I found a rate of 34 cents to Hawks, effective February 20, 1937, in Union Pacific 31—well, I. C. C. Nos. 4351, 3158-A, freight tariff number, that was effective nine months prior to the date that it was reflected in 19245 the correction sheet as shown by these notes.

Q. What tariffs did you use, Mr. Simpson?

A. Union Pacific Freight Tariff No. 3158-A, I. C. C. 4351, to Turquoise, N. M.—now, my notes have read, I. C. C. 4351, in both cases; but there seems to be an error as to the freight tariff number.

Q. When you say your "notes here," are you referring to Commission's Exhibit 3048, for identification (showing to witness)?

A. Yes, sir. On March 22—no, on February 20, 1937, there was established a rate from Laramie to Hawks of 34 cents, and from Laramie to Turquoise of 45 cents. Approximately nine months later, according to this note, which I presume is correct, a correction sheet was issued effective at once announcing that change.

Q. Now, with respect to those destinations, I think you said that there might be some combination of rate?

A. There might be a joint rate, or it might be a com-

bination rate, or a local rate; I couldn't say how it was published. I did not deny that those rates of 45 and 55 1/2 might have been published, but I could not find them at the time I made my first check.

Q. With respect to the correctness of the rate as shown in the rate book, did you examine Kipp's Tariff Series 133, I. C. C. A-2475?

19246 A. (Witness refers to data) I examined that tariff for a certain rate, but whether I looked in there for this particular rate—I used his 132 Tariff, I don't remember whether I used his 133 or not. I don't find any reference to it here, in my examination of this.

Q. Did you use I.C.C. 9735, Santa Fe, also?

A. My exception was not to the rate shown in the rate book, but to the date of the correction sheet.

Q. Yes, I realize that.

A. I did not take exception to—

Q. But did you with respect to either the correction sheet or the rate book use I.C.C. 9735 Santa Fe? Does that appear in your notes?

A. I don't see any reference to it.

Q. Well, is it not a fact, Mr. Simpson, that this tariff we are now discussing, as you suspected, a combination from Laramie, Wyo., through to Pueblo, Colo, which gives rates set forth in the rate book?

A. I couldn't say. There are millions of tariffs on file with the Interstate Commerce Commission, and I wouldn't attempt to remember the rates in them without checking.

Q. Did you check them in giving your answer?

A. I couldn't state at this late date.

Q. I am putting my question, Mr. Simpson—

A. I presume we did not, because I have no rea-

19247 son to suspect the inaccuracy of the rate on that date.

Q. Yes.

Did you find by any check that you made that the rate to Pueblo was 18½ cents, and beyond Pueblo it was 26½ cents, that is to Hawks, N. M.,—do your notes show you found that information when you were checking it?

A. Not the ones I have with me. I do not have either factor with me, so I can't answer as to either factor.

Q. All right.

In making these checks, Mr. Simpson, you did not attempt to check in any way with relation to the business,

for instance,—you, of your own knowledge, don't know any of the locations of the plants, or anything of that kind, do you?

A. Not as to the specific location within city limits, and I do not know for a fact that there is a cement plant at any of these points.

Q. No.

A. I have reason to believe there is owing to the fact commodity rates are published from those towns.

Q. Precisely.

A. But that's as far as I can go.

Q. Yes.

And, for instance, you did not know when you testified on direct that the Universal-Atlas had the only ce-
19248 ment at Universal, Pa., for instance, did you?

No, sir.

Q. And you did not know that it had a mill at Northampton, Pa., when you testified it is considerably closer to Colby, Maine, than Universal, Pa.?

A. I knew that there were rates published from Northampton, Pa., on cement to various points, but whether there was a factory there, and what the name of the company operating that factory was, I did not know.

Q. Well, now—

A. And in response to the later question, or the latter portion of the question, I would imagine, without looking at the map, that Northampton, Pa., would be closer to any point in Maine than Universal, Pa., but I would have to check up more accurately before I could testify on that.

Q. I mean, you did not take that into consideration—in fact, you did not know that one way or another at the time you made your statement?

A. I was not asked that question.

Q. You were not asked to look into it?

A. No, sir.

Q. And did you or did you not know whether or not Universal had a mill at Hudson, N. Y., which was closer than either of these other two mills to Colby, Maine?

A. I had no idea as to the name of the firms
19249 operating the specific mills.

Trial Examiner Norwood: But did you know that there was any mill there?

The Witness: No, sir.

Trial Examiner Norwood: Do your tariffs show?

The Witness: The switching tariffs do show, but I was not asked as to that feature, and so I made no check of it.

By Mr. Leisure:

Q. In other words, whoever it was that pointed out these so-called errors to you did not point out those facts to you also?

A. I was merely asked to check the rate from those specific points to those specific points.

Q. The ones that were given to you?

A. And no reference was made as to whether any cement had moved under those rates or not. It makes no difference to us whether a rate is ever used or not, the rate is in the tariff, and we can quote it for what it is worth.

Q. Now, I think you said that a correction sheet showed a rate of 50½ cents effective November 15, 1937.

Mr. Leisure: That is page 18924 and 5 of the record, Mr. Wooden.

By Mr. Leisure:

Q. And I think you said that you could not verify 19250 the change on the correction sheet from 48½ to 50½?

A. Yes, sir.

Q. Do you recall that, Mr. Simpson?

A. Yes, sir.

Q. Now, in reaching that conclusion, did you examine supplement 31 to the Maine Central Tariff, being I.C.C. designated C-4487?

A. I believe I did, sir.

Q. You think you did?

A. Yes, sir; but that only accounts for an increase of 1 cent.

Now, the Aroostoock Valley—I believe was the name of the railroad—the second portion of the combination, my recollection is, did not file a supplement on the date shown by the correction sheet. It was a few days late in filing its correction sheet, and an increase of 1 cent on the Aroostoock Valley did not go into force until after the correction sheet had been issued. The rate was 49½ cents on the date the correction sheet announced it as 50½.

Q. Well, with respect to this 1 cent which you have mentioned, is it not a fact that this tariff shows that the commodity factor between Northern Maine Junction was increased 1 cent per hundred pounds on November 15, 1937, Mr. Simpson?

A. (Referring to date) My recollection is that that supplement was dated November 25 rather than 15.
19251 Now, I could not state as to the date positively, but it was a few days after the 20th.

Q. So that the original rate of 48½ cents was subjected to a 1-cent emergency increase whether you accept my figure of November 15, 1937, or your figure of November 20, 1937?

A. It evidently became 50½ cents as shown in the correction sheet, but it was not 50½ cents according to my best recollection on the date shown at the issue date of the correction sheet.

Q. Well, if—

A. (Resuming) It was 49½ cents then owing to what appears to have been, according to my recollection, a tariff error.

Q. If the 1-cent rate is shown as of November 15, if you should be mistaken, about the 20th, Mr. Simpson—

A. Yes, sir.

Q. If it should be shown on your rates as November 15, 1937, that would make the rate on November 15, 1937, 50½ cents?

A. If both the Maine Central and the Aroostoock Valley filed the increases, it was 48½ prior to the increase, and the rates were published in two separate tariffs.

Now, the correct tariff was subjected to an increase of 1 cent, but, as I have previously testified, according to my recollection, the second factor—or the rate between the junction point and the destination—was not made subject
to the increase until about 10 days after the general
19252 increase shown in most of these tariffs.

Q. But if it should appear that it is, on November 15, 1937, then the 50½-cent rate as shown by the Institute book would be correct, would it not, Mr. Simpson?

A. Oh, yes.

Q. I think you said that the two weeks' delay—that there was an error in the official tariff?

A. I say it appears to have been.

Q. Do you sometimes find errors in the official tariffs, Mr. Simpson?

A. Frequently. That is what appears to be errors. We cannot prove that they are errors, but we have every reason to believe they are. We have a force of thirty or forty clerks checking these tariffs as they are filed every day, and right up on what appears to be errors of various kinds.

Q. And it requires an expert, or at least a man who knows his business very well, to know how to interpret them?

A. Oh, yes, yes, sir.

Q. Yes.

Mr. Leisure: Now, I am going to go to page 18926 of the record, Mr. Wooden.

By Mr. Leisure:

Q. With reference to the Rockland, Me., Bristol, N. H., rate. I think you stated on April 1, 1937, the Institute correction sheet showed a rate of 17½ cents, when it
19253 should have been 15 cents. Do you recall?

A. I think I testified that on June 7, 1937, the correction sheet showed a rate of 17½ cents.

Q. Yes.

A. And according to my check on June 7, 1937, the rate was 15 cents, as named in Maine Central I.C.C. No. C-4463.

Q. You are now referring to supplement 50 to the Maine Central Tariff, Mr. Simpson?

A. I haven't got—let us see, now (referring to data)—

Q. Is that what you just referred to?

A. Item 115, station 323, is all I have in my notes.

19254 Q. Did you, in coming to your conclusion, refer to Supplement 50 to the Maine Central tariff, I.C.C. No. C-4463?

A. I couldn't say. I made an examination of the tariff. Whether that particular supplement was in force on that date or not, I couldn't state, on this date.

Q. Isn't it a fact that this supplement 50, to which I have just referred, does show that as of April 1, 1937, the rate from Rockland to Bristol was revised from 15 cents to 15 cents plus 50 cents per net ton or 17½ cents, just as shown by the rate book?

A. If your statement is correct, and it is possible it may be, as to the provision of the 50-cent charge which, I presume, is a charge for the Boston & Maine Transportation Company, then the rate is, as stated by you, correct and only the date wrong.

Q. And if you find that that is incorrect you will correct the record, won't you, Mr. Simpson?

A. I will be very glad to.

19258 Q. Now you discussed, Mr. Simpson, a rate, I think, from, I believe it was Mitchel, Indiana, to Hopewell, Mississippi?

A. Yes, sir.

Q. And I think you said that was shown in the rate book as 24½ cents?

A. Yes, sir.

Q. As of the date of issue, but that the correct rate was 26½ cents?

A. Yes, sir.

Mr. Leisure: This discussion appears, Mr. Wooden, at page 18930 of the record.

By Mr. Leisure:

Q. And I believe you cited as authority on that,
19259 Mr. Simpson, Jones' tariff, I.C.C. 2549. Do you recall that?

A. Yes, sir. Do you—

Q. What is that?

A. Do you care if I make a statement regarding that rate?

Q. No, I would rather just ask you specific questions and if you want to explain later, you can.

I think we will save time by this method, Mr. Simpson.

A. All right.

Q. Supplement 26 to this tariff I.C.C. 2145 became effective on April 10, 1934, prior to the issuance of the rate book, didn't it, Mr. Simpson?

A. My recollection is that it did.

Q. I am speaking, now, of the provision making the rate to Gatesville, Mississippi, apply also to Hopewell?

A. That provision was shown in—well, I will start over again.

I think I can save time by explaining how the rate was published.

The rate tariff in I.C.C., number of which is—

Q. Let me just ask you these questions, Mr. Simpson. I think we can get along faster.

A. All right, sir.

Q. This rate at Gatesville amounted to 24½ cents?

A. Yes, sir; I believe that is correct.

19260 Q. So there was a conflict in the rates between the published rates from Mitchel to Hopewell and the provision in Supplement 26, wasn't there?

A. No, sir.

Q. All right.

A. There may have been a conflict, but under the practices of the Interstate Commerce Commission, supported

by numerous decisions, in the case of a difference between two rates, one of which is more specific than the other, that which is more specific, irrespective of whether it is higher or lower than the other rate, is applied.

There are numerous cases in which that has been so held and I supplied Mr. Wooden with a number of recent references to such holdings.

Q. What is the ruling, Mr. Simpson, where one rate is lower than the other as to whether or not the shipper is entitled to the lower of the two?

A. If the rate of like kind, equally specific, irrespective of which rate was issued first, if both rates are in force on the date of the shipment, the lower rate applies, but if the rates are of unlike kind—

Q. I am just talking about that instance, for the moment, Mr. Simpson. So, it is true, is it not, that where they are of like kind it is a customary ruling of the Interstate Commerce Commission that where there is a
19261 conflict in rates the shipper is entitled to the lower of the two?

A. No, sir; only in the cases where the rates are of like kind.

Q. That is what I said.

In this instance that I was applying, if the rate is strictly construed, the rate would be 24½ cents instead of 26½ cents?

A. No, sir, I can't agree with you.

The rate from Hopewell was named in the rate tariff and you didn't have to go outside of the borders of the tariff to get a complete rate.

The only way you could get the Gatesville rate was to go over into the territorial directories and get the authority to use the Gatesville rate; then come back to the rate tariff, disregard the specific rate to Hopewell and apply the other rate.

In cases of that kind it is the universal holding, so far as I could find, that the rate which is all contained within the borders of the tariff as being the more specific rate was thus applied.

I might state I discussed that particular rate with several of my associates in the Commission and they all agreed with me that the more specific rate applied.

Q. Are you acquainted with a Mr. Glessner, G-l-e-s-s-n-e-r?

A. Yes, sir.

19262 Q. He is the chief rate clerk, isn't he, Mr. Simpson?

A. Yes, sir.

Q. Are you aware of the fact that Mr. Glessner, on this very rate, expressed the conclusion that the rate of 24½ cents applied?

A. I was in the room when he talked to Mr. Clous. He expressed the opinion that it would not apply; the higher rate of 26½ cents would apply.

Q. He didn't say that the 24½-cent rate would apply?

A. No, sir, and he referred the matter to his superior who also agreed with him.

Q. The fact you had this discussion, as you did, over that rate, among you experts, is that some—does that give some significance, in your mind, to the conplexity of these tariffs; these tariffs and their interpretations?

A. All tariffs require someone experienced with traffic matters to interpret them. They are all, almost all of them, complicated.

I might state the reason I discussed that particular rate with Mr. Glessner—

Q. And even when you are experienced in the interpretation of these rates and spend your life at them, you don't always agree on the interpretation?

A. You are absolutely right, there.

But this particular rate, Mr. Clous, whom I iden-

19263 tified earlier today, called my attention to this rate and asked me if I agreed with the 24½-cent rate.

At first I agreed with them and then I got to checking in the tariff and discovered the difference in specificness of the tariffs; and I asked him if he would care to submit the case to Mr. Glessner and if Mr. Glessner ruled that 24½-cent rate would apply I would be glad to correct my testimony.

Mr. Glessner said that in his opinion the more specific rate of 26½ cents applied.

He, however, wanted to be sure of his ground and referred it to Mr. Cox, his superior, who also took the same stand.

Q. But you did have considerable discussion about it. You say you, yourself, for instance, at first believed that 24½-cent rate would apply?

A. I believed that until I checked the tariffs and found

that the rate of 26½ cents was the specific rate whereas the 24½ cents was the group rate, and we always give preference to a specific rate as against a group rate.

19264 Q. Did you talk, further, with Mr. Glessner about the rate after Mr. Clous left?

A. No, sir.

Q. Now you testified, also, with reference to certain rates from Kingsport, Tenn. I think it was to Bergoo, Blue Springs, and Cheat Bridge and Deerlick Mine and Big John?

A. Yes, sir.

Q. And certain other points in West Virginia?

A. Yes, sir.

Mr. Leisure: That is on pages 18897 to 18904 of the record, Mr. Wooden.

By Mr. Leisure:

Q. I think you said, Mr. Simpson, as to those rates that they were correct in all instances as originally stated in the freight rate book; is that correct?

A. No, sir. I said that in certain cases I could not check the rate shown in the freight rate book. I am relying on my notes from my previous statement.

Q. Yes.

A. The freight rate book showed a rate to Bergoo of 32½ cents.

At the time of my previous check the lowest rate I could check was 33½. To Big John Mine, the rate book showed a rate of 31½ whereas I discovered a rate of 30½.

The Blue Spring rate was shown in the rate book

19265 as 32½ whereas I could not check a rate lower than 33½.

The Cheat Bridge rate I found to be correct.

The Deerlick Mine rate was shown at 31 cents and the lowest rate I could check was 30½.

I might state, in every instance, in the last answer, where I have referred to the rate in the rate book, it is the rate as shown on these notes and is subject to any correction because of any error on these notes and by "these notes" I am referring to Commission's Exhibit 3048, for identification.

Q. And those are the notes which you took from the original tariffs; I mean, those figures?

A. The rates which I used, I believe, are correct, but

the rates shown in the rate book, I don't know as to the correctness of these (indicating Commission's Exhibit 3048, for identification).

Q. Now, what was the effective date of the Institute Rate Book No. 4 for West Virginia; the one which these rates had reference to?

Mr. MacIntyre: Just a moment.

(Mr. Wooden hands a document to the witness.)

A. Exhibit 1110-EE carries an effective date of July 20, 1935.

By Mr. Leisure:

Q. That is the book that was shown to you in the courtroom?

A. I presume so.

19266 Q. Now, in considering those destinations, Mr. Simpson, did you check any combination of rates through Kenova for all the destinations indicated in West Virginia except Coco?

A. I checked Durbin but I do not recall of having checked Kenova.

Q. You stated that the freight rate as shown to Coco was correct, did you not, Mr. Simpson; that is, from Kingsport to Coco?

A. According to my check, the rate to Coco was correct; yes, sir.

Q. And on January 25, 1936, this freight rate structure was changed, was it not?

A. Yes, sir.

Q. And through rates were established from Kingsport to these various points?

A. That is correct, sir.

Q. So would you say this error as to these other destinations from Kingsport amounted to a failure to discover the established through rate immediately, at the time they were published, and leaving in effect the old rate established on the combination basis?

A. According to my check, as indicated by these notes, and according to my recollection, for a period of seven months or eight months the rate book as modified by the correction sheet was incorrect unless there was an

19267 earlier establishment than Mr. Wooden has called to my attention.

Q. You testified with reference to the rate from Kansas City to Winthrop, Iowa.

Mr. Leisure: That is 18862 of the record, Mr. Wooden.

By Mr. Leisure:

Q. I think you stated that there was an emergency rate which ran from August 18, 1935, to December 31, 1936, and it was in effect on October 6, 1936; do you recall that?

A. I made a statement in connection, perhaps, with abbreviated rates, that there were emergency charges as testified to after my original testimony, of 1 percent per hundred pounds in effect on three different periods; 1932-1933—let us see (referring to documents); 1932-1933, 1935-1936, 1937-1938.

By Leisure:

Q. Will you look at correction sheet 12, at the Iowa Rate Book No. 2.

Mr. MacIntyre: What page of the record is that, Mr. Leisure, please?

Mr. Leisure: 18862.

(Mr. Wooden hands document to the witness.)

19268 By Mr Leisure:

Q. What is the date that was issued, Iowa Rate Book No. 2?

Mr. Wooden: He has the correction sheets.

By Mr. Leisure:

Q. Correction sheet 12.

A. Correction sheet 12 was issued April 9, 1935, and effective April 18, 1935.

Q. And does it set forth an emergency rate effective April 18, 1935, to June 30, 1936?

A. Yes, sir.

Q. Now, look at correction sheet 34 of the same Iowa Rate Book, please, dated June 30, 1936.

A. Of course, Mr. Leisure, you remember I did not take exception to the emergency charges as shown in my previous testimony. I admitted the books were correct as to that, so far as I know.

Q. Have you got the place?

A. (Referring to data) This correction sheet 36.

Q. Thirty-four?

A. Thirty-four.

Q. Dated June 30, 1936.
A. June 23, 1936.
Q. Effective June 30, is it?
A. Yes, sir.
Q. Effective June 30?
19269 A. Referring to emergency charges?
Q. Yes.
A. Which were to have expired June 30, 1936.
Q. Does it extend the emergency rate to December 31, 1936?
A. Yes, sir.
Mr. Wooden: Give the exhibit number, please.
The Witness: 3015-HH.
Trial Examiner Norwood: What is your reason for cross-examining him on this particular feature?
Mr. Leisure: Well, my next question, Your Honor, was going to be whether or not the witness would like to change his testimony as to whether the emergency increase commenced on August 18, 1935.
I am now referring to page 18862 of the record.
19271 By Mr. Leisure:
Q. Certainly.
I have specific reference, Mr. Simpson, to your statement where you say:
"I should state that the rate of 16 cents which was found in force on October 6, 1936, was subject to an added emergency charge of 1 cent a hundred pounds as shown in the tariff of emergency charges, Agent Kipp's, known as A-2245, 2277, 2572, or 2611, which were effective between January 4, 1932, and September 30, 1933, and between August 18, 1935, and December 31, 1936."
Will you look at it and see if that is correct?
19272 A. I am afraid that this is a stenographic error, because—
Q. Well, it should be corrected whatever it is.
A. Yes.
Q. Is that not so, Mr. Simpson?
A. Yes. That should be April 18, I have in there, which I don't—
Mr. MacIntyre: May the witness see the exhibit for identification to refresh his memory again?

By Mr. Leisure:

Q. It should be what, Mr. Simpson?

A. I am just asking Counsel.

Mr. MacIntyre: Will you get it?

The Witness: My recollection is April 18, but my notes are over there.

Trial Examiner Norwood: Let him have the notes.

By Mr. Leisure:

Q. Are these the notes you testified from (showing documents to witness)?

A. That is the note that I rely on as being correct.

Q. You did not use that note when you testified?

A. Yes, I did.

Q. As to this?

A. No, as to the full history.

Q. I mean as to this.

A. As to the full history of the emergency charges
19273 I used this, and it shows here August—no, April 18, 1935 (referring to data).

Q. What does your Exhibit 3048 show? What did you use there (referring to data)?

A. 3048, there is an error.

Q. It is an error?

A. It shows August; but April is correct.

Q. Have we got it right now?

A. Yes.

Q. State what the correct one is.

A. April 18, 1935.

Q. Thank you.

You stated that the emergency increase was in effect on October 6, 1936. Will you explain to the Examiner why you selected the date of October 6, 1936, instead of some other date?

A. I presume because I was talking about a rate that was in force on October 6, 1936, and mentioned the charge of it being in force on that date.

Q. But, as a matter of fact, the Institute's book correctly stated the rate on October 6, 1936, did it not?

A. Which rate?

19274 Q. You will, of course, have to take the correction sheet and the rate book together for that date, Mr. Simpson.

A. (Referring to data.) The Exhibit 1110-EE contains

a provision that except as otherwise indicated all rates are subject to the following emergency charges authorized by the Interstate Commerce Commission in Ex Parte 115 on June 30, 1936, and, as I stated in my testimony, or intended to state—I think I did—my testimony did not take into consideration any emergency charges, because I had found no error in any, and talked about only the line-haul rates on November 15, 1937, when the rate itself was increased rather than added emergency charge.

Q. Then was your testimony—and is it—that it was correct as of October 6, 1936, Mr. Simpson?

A. So far as I checked, which was very slight, there was no errors in the emergency charge situation on any date.

Mr. Wooden: Did you say "October 6, 1936"?

Mr. Leisure: Yes.

Q. Now, will you take up your testimony with regard to the special 8-cent rate from Nashville to Sheffield, Ala.?

19275 A. Yes, sir.

Mr. Leisure: That refers to pages 18945 to 18950 of the record, Mr. Wooden.

(Witness refers to data.)

Q. I understood you said you got this information from Supplement No. 40, I. C. C. cement rate 341-A, I. C. C. 1626,—is that correct?

A. (Referring to data.) Nashville to Sheffield?

Q. Yes.

A. Supplement 32.

Q. Page 21?

A. My notes do not show the page number.

Q. Do you find that that rate is modified by certain provisions set forth in the foot note, Mr. Simpson?

A. Which rate are you speaking of, and which foot note?

Q. Well, I head taken up before the recess Nashville to Sheffield.

A. Yes, sir.

Q. And you were giving me your citation.

A. Yes, sir.

19276 Q. I am simply saying now, do you find that the rate there is modified by certain provisions set forth in the foot note?

A. I put into the record the occasion or reference to that rate, all references in the foot note.

Q. Yes, and one of those is note "M", is it not?

A. I did not—let us see (referring to data). I did not carry the same reference letter as the tariff carried, because of the change in letters from time to time.

Q. Regardless of the designation, then, does the foot note read:

"Applicable on shipments moving on commercial bills of lading to points on the Tennessee River between Florence, Ala., and Decatur, Ala. (not inclusive), and between Florence, Ala., and Perryville, Tenn. (not inclusive), rates do not include cost of transfer necessary to make delivery to barge at Florence or Sheffield, Ala."

A. According to my notes, such a reference was shown.

Q. Yes.

And this rate of 8 cents could not, under any circumstances, be employed for shipments requiring delivery at Sheffield,—wouldn't that be so?

A. No, sir. If the shipment were to be delivered at Sheffield, and there transported further by barge, the rate would be 8 cents.

19277 I might state that I was advised by Mr. White that the cement—that the majority of the cement that was delivered in Sheffield was actually used on the dams and other work of the Tennessee Valley Authority, and in that event the 8-cent rate would apply.

Q. Then, you based your finding on that information from Mr. White?

A. Yes, sir.

The Witness: May I explain a little further, Mr. Leisure?

19278 Trial Examiner Norwood: Go ahead.

By Mr. Leisure:

Q. If you desire.

A. There are numerous classifications of freight rates. One of the breakdowns of the rates of one type, and rates of another, is that of proportional or flat rates. A proportional rate is a rate raised from one point to another point, which can only apply in connection with another rate from a more distant origin, or to a more distant destination.

Q. You mean a proportional rate?

A. A proportional rate; yes, sir. The proportional rates, themselves, are broken down into numerous classes, many not here pertinent. One of these classes for a proportional rate is a so-called trans-shipping rate. A trans-shipping rate is a rate which is used for a shipment going from a point A to point B, and further by another type of transportation or another carrier of the same type of transportation from point B to C, but not on a through rate, or not—usually not on a through rate—a joint rate, I should say.

A shipment that was going from Nashville, Tenn., or any other point in that statement, and the cement delivered at Sheffield to the barge company, and there loaded on the barge and transported beyond Sheffield, for work at the Wheeler Dam, or any other dam of the Tennessee Valley Authority, must be subject to the rates shown
19279 under the 80,000-pound minimum, and subject to the other conditions, one of which was named by Mr. Leisure.

By Mr. Leisure:

Q. And this 8-cent rate was a proportional rate, was it?

A. It was a proportional rate of the type I have described; yes, sir.

Q. And there is no freight rate of 8 cents from Nashville to Sheffield except as a component part of a continued rail-and-barge haul,—that is true, is it not, Mr. Simpson?

A. So far as my check, that is true.

Q. So the freight rate note is correct in showing this rates of 12½ cents, is it not, for delivery at Sheffield?

A. If the cement is to be consumed at Sheffield, the freight rate book is correct.

Q. Precisely.

A. Now, as to the use of the rate book, I am not prepared to testify.

Q. We have seen something about how complicated these figures are. Did it take a considerable time for you to check these rates, Mr. Simpson?

A. I had three men assisting me, who got out the tariffs, and called to my attention the provision which they considered pertinent. I then spent some two weeks on the—well, no, about a month—I spent about a month, myself, verifying the tariff which they showed me, and
19280 in those instances where I was not satisfied with the

tariffs they brought me, getting other tariffs to assist me.

Q. And that was just as to these specific items that were pointed out to you by Mr. White? You did not attempt to go through all the rate books that you have told us about, for instance—or all the correction sheets?

A. Oh, no, no.

Q. Just these specific ones?

A. Well, in speaking of the time on all the testimony that I put in during the two days.

Q. Yes, that is what I am speaking about. And these men that assisted you, they were experiencesd men in dealing with rates, also?

A. Yes, the time spent on the check of the so-called errors—if I may use the term "errors"—was about a week for myself and about three days for each of the three men.

Q. Yes.

And with your experience in dealing with rates, if the man was not as experienced as yourself, and your assistants, you could multiply that time by what—by about four?

A. I would hesitate to guess.

Q. That would be some indication?

A. Quite an elaborate one.

Q. I think you said as to Kansas City, Mo., to Winthrop, Iowa—what was the rate that you said your tabu-
19281 lation showed as the correct I. C. C. rate as to that —Kansas City, Mo., to Winthrop, Iowa?

A. The rate which we found in force throughout the period October 6, 1934, to April 28, 1936, was 16 cents, except as adjusted by the tariff of emergency charges, which have been covered by other testimony.

Q. Yes.

Q. I show you a tabulation on the population of the towns involved, and ask you what is the population for Winthrop, Iowa (showing data to witness)?

I have the original record. You can look at it if you want to instead of the tabulation (producing a Rand-McNally Atlas).

A. Thank you.

Q. What is the population shown there, Mr. Simpson?

A. Using the Respondents' Exhibit 186—

Mr. Wooden: Your Honor, I want to object, that
19282 this is going beyond the scope of any direct examination that I put to this witness; therefore, not in order.

Trial Examiner Norwood: What is that paper?

Mr. Leisure: That is a tabulation from the Rand-McNally Commercial Atlas, Your Honor.

Mr. Wooden pointed out certain destinations here and asked considerable information about the shipment of cement, and the rates for the shipment of cement, over those roads. I am trying to complete the picture now as to—the weight of the testimony.

Mr. Wooden: All right, there is a way to do it, but not this—

Trial Examiner Norwood: To what purpose do you desire to complete the picture.

Mr. Leisure: If Your Honor pleases, Mr. Wooden has picked out two destinations here.

Trial Examiner Norwood: Yes.

Mr. Leisure: As showing what the rates were there. Now, I want to show what those destinations were as to the correctness of these freight rate books; in other words, if no shipment of cement is made over those roads at all I think it goes to the weight of the testimony which the witness has given on direct, and I propose to develop that feature further.

Trial Examiner Norwood: Is that not part of
19283 your case?

Mr. Leisure: No, sir; it is on cross-examination as to this witness' own testimony.

Trial Examiner Norwood: He has not testified anything about the population.

Mr. Leisure: No, I know he has not; Mr. Wooden would see to that, but it does go to the weight.

Trial Examiner Norwood: You have not asked him.

Mr. Wooden: Why should I ask him to?

Trial Examiner Norwood: The objection is sustained.

19291 Q. Mr. Simpson, what is the practice for correction of rates, as far as the railroads are concerned? How do they come to your knowledge when a correction is made?

A. Under Section 6 of the Interstate Commerce Act all rates must be published in tariffs in the form prescribed by the Interstate Commerce Commission.

The Interstate Commerce Commission from time to time has issued several tariff circulars each cancelling the previous circular.

19292 The present circular is tariff circular 20.

The law requires that all rates be published after 30 days' notice except as the Interstate Commerce Commission gives permission for filing a change on shorter notice.

A change in a rate under the conditions I have specified may be made in one of two manners; either by publishing a new tariff which canceled the rate in the old tariff and brought forward the matter in a new tariff, or by issuing a supplement to an existing tariff.

I wouldn't like to estimate the percentage, but by far the larger number of rates go in force on 30 or more days' notice. A comparatively small number of rates, it is hard to say the percentage, go in force on from 1 to 29 days' notice; usually, 5, 10, or 15 days.

Q. Are you sufficiently familiar with the practice of the rules to say what their practice is when they discover an error?

For instance, when a shipment is about to be made, if they find an error, do they then call that error to the attention of the shipper?

A. There are two ways that that can be handled.

If time permits, the practice of the carriers is to file with the Interstate Commerce Commission a six section application asking for authority to change that rate on its purported effective date, if the error is discovered
19293 before the rate has gone in force, or on a short notice, as the Commission will be willing to grant, and show the correct rate.

If time does not permit that procedure the shipper will make his shipment under the erroneously published rate and take a chance on getting a reparation either on the special docket or on the formal docket.

Q. Would there be any opportunity for the railroad to call that error to the attention of the shipper if there were no shipment made whatever over the road where the error appeared, over the route where the error appeared?

A. Oh, yes.

Q. How would the railroad arrive at the conclusion of calling it to the attention of the shipper if no shipment were made?

A. They would have no occasion to call it—

Q. How would they know what shipper, to call their attention to it?

A. There are millions and millions of rates published in the tariffs on file with the Interstate Commerce Commission. The carrier, when publishing a rate, does not know which of its rates will be used.

Now, for instance, I heave before me Pennsylvania Railroad I. C. C. No. 1622, a schedule now in force.

I seriously doubt that cement has moved from
19294 every point shown in this book to every point shown in this book; in fact, I would go further and say I am positive that situation is true.

Q. As bearing on that,—

A. May I finish my answer, Mr. Leisure?

Q. No; I would rather—

Trial Examiner Norwood: Let him finish his answer.

Mr. Leisure: If Your Honor please, the witness isn't answering any question I asked him.

Trial Examiner Norwood: If you ask him questions like that, you will have to take his answer.

(Addressing the witness.) Complete it.

A. I have before me, as I say, tariff I. C. C. 1622 of the Pennsylvania Railroad. It names, a page I opened at random, 148 rates to Mansfield, Connecticut. I do not know whether any shipment has moved from Bessimer, Pennsylvania, to Manfield, Connecticut, or not.

The man who compiled the tariff did not know, when he compiled the tariff, whether any shipment had moved or whether any shipment might move, but in the event some dealer, contractor, or any other person wanted to buy a carload of cement and have it delivered at Mansfield, Connecticut, to avoid a departure from Section 4 of the Interstate Commerce Commission Act, it is necessary that this rate be published.

19295 Q. You said you didn't know whether cement had been shipped.

Is the converse of that also true: You can't say, of your own knowledge, that any cement manufacturer ever used a single one of these rates for the shipment of cement, before it was corrected, which you have testified to, can you?

A. I do not know of my own knowledge that a single cement manufacturer ever did use a rate book because I never worked in a cement plant.

Mr. Leisure: If Your Honor pleases, as bearing upon the materiality and relevancy and the weight of the evi-

dence as offered by Mr. Wooden on direct examination, in selecting some of the destinations that appear and showing that these errors, I offer to show that Brevater Junction, for instance, Minnesota, has no population.

That Rush Lake has none.

That Charlesville, Minnesota, has 18 people.

That Manchester, Minnesota, has 100 people.

That Plain View, Missouri, another destination, has none.

That Rokeby, Nebraska, has 28 people. That Rutland, Nebraska, has no people.

That Hawks, New Mexico, has no people.

That Turquoise, New Mexico, has 15 people.

That Close, North Dakota, has 6 people

19296 Wayside, Oklahoma, has 21 people.

Tyson, Mississippi, has no people.

Coco, West Virginia, has 140 people.

Bergoo, West Virginia, has 450 people.

Big John Mine, West Virginia, has 8 people.

Blue Spring, West Virginia, has no persons.

Cheat Bridge, West Virginia, has 45 people.

Deerlick Mine has 6 people.

Millbridge, Illinois, has no people.

Cornett, Kentucky, has no people.

Cobb, Kentucky, has 100 people.

Asa, Kentucky, has 15 people.

Tyson, Mississippi, has no people, and so on, with other destinations, there.

In fact, I offer to show that Mr. White, after having these books in his possession for about a year, has found one error of the slightest consequence which is Evansville, Indiana, which has 102,250 people.

That proof, it seems to me, is relevant and material to the issues in this case and I offer to prove it through this witness.

19299 Trial Examiner Norwood: I shall reject the proffer of testimony, and I shall not allow it, as not being proper cross-examination of this particular witness.

Does this witness know anything about the population in those towns?

Mr. Leisure: No, but I have Rand-McNally's Commercial Atlas for 1939 here.

19300 The Witness: I know the population of a few of them.

Mr. Leisure: Mr. Wooden can use freight rate books and

he doesn't know anything about shipment of cement, either. I don't see why it doesn't work the same way.

Mr. Wooden: I haven't seen any Rand-McNally population tables in evidence yet.

By Mr. Leisure:

Q. Mr. Simpson, so far we have been discussing errors in the cement freight rate book.

A. Yes, sir.

Q. The official tariffs as filed with the Interstate Commerce Commission contain the official rates, do they not?

A. Yes, sir.

Q. And I think—

A. I would make a slight change in your phraseology, Mr. Leisure.

Q. All right.

A. The tariffs on file with the Interstate Commerce Commission contain the only correct rates, and any other rate is either a reproduction of that rate or an error, one of the two.

Q. As to erroneous rates, would you agree with me that a rate which is considerably higher than the rates on either side of it, on the same route, could not properly be classified as erroneous unless it had been specifically in-
19301 tended to be higher?

A. There is no relationship between the lawfulness of a rate and the intent of the carrier.

Just what you are attempting to bring out I really don't know, but I will state that a rate may depart from both the long and short-haul clause and the aggregate of the intermediate clause of the fourth section and still be the rate which must be legally applied until reparation is awarded by the Commissioner either on the special docket or on the formal docket.

Q. But for the reparations which you have mentioned, it would be an erroneous rate, wouldn't it, Mr. Simpson?

A. An erroneous rate as intended, but my testimony is a rate copied from a tariff incorrectly reproduced; as, for instance, a rate of 26 cents and somebody quotes 16 cents, whether that quotation is by telephone, letter, or rate book, it is an erroneous rate.

Q. As to these erroneous rates; it is provided for, is it not, that they are corrected on application under section 6 of the Interstate Commerce Commission Act?

A. They may be corrected if the attention of the Commission is called to their error before the shipment is made, but if the Commission's attention is not called to their error until after the shipment is made the rate itself may be corrected at some future time and reparation may
19302 be awarded as of the previous date unless that rate was ordered in by the Commission on an improper basis, and then, under the decision in the Arizona Grocery case, the citation of which I don't have at hand, the Commission is powerless to award reparation.

Q. And nothing is done, as far as the Interstate Commerce Commission is concerned, until it is called to their attention in some way?

A. I wouldn't say that, exactly. We have a force of thirty or forty men who check into certain types of errors. They are known as tariff examiners.

We have a Board of Suspension which occasionally, although not frequently, acts on its own motion and calls to the attention of the Commission improper adjustment and changes of rates.

19303 Washington, D. C.,
April 12, 1939.

19307 Mr. Withrow: Yes, we have a few corrections we would like to make at this time, Your Honor.
19308 We would like to have these corrections made, Your Honor.

Trial Examiner Norwood: I find here that a great many of these corrections are merely editing, and that is all right for Counsel in regard to his own speech and his own questions, but a great many of them are not mistakes of the Reporters. I think it is due them to state that, and in some cases the changes are changes in questions asked by the other lawyer so I think that those corrections as suggested by Counsel should be checked before they are ordered made, finally.

Mr. Wooden: It has been our position all along,
19309 subject to check.

19310 *Cross-Examination by Mr. Leisure (Continued).*

Q. Mr. Simpson, in this large Commission's Exhibit 3061 (showing document to witness), beginning with section AAA, the page that applies to cement is page 224—

A. That is one of the pages.

Q. —at the end of the book; is that not so?

A. That is one of the pages that applies to cement.

Q. Page 224.

19311 A. (Indicating.) The other pages that apply to cement are pages—

Q. I am speaking following triple A, AAA, on, Mr. Simpson; I am speaking only about that following AAA (indicating). I say, from AAA on to the end of the book.

A. Section, you mean?

Q. Yes, section AAA, from there on to the end of the book the page that applies to cement is page 224, is that so?

A. (Examining document). 219, 224, 309 to 323, and the supplements are necessary in addition to the pages—

Q. What supplements?

A. Supplements 626, 28, and 31, and all pages preceding the page—and all pages—

Q. I am not talking about anything except as I indicated that following section AAA, on to the end of the book.

A. All right.

Those pages following AAA, page AAA itself, and those pages following.

Q. Which you have indicated?

A. Yes.

Q. The commodity rates are always lower than the class rates, are they, Mr. Simpson?

A. No, sir; they are when published lower—usually lower than the class rates, but are not in all instances lower than the class rates, and there are numerous

19312 class rates named in that tariff which apply from and to points for which no commodity rates are provided; therefore, in order to certify as to the effectiveness of that page it is necessary to certify as to the effectiveness of the class—of the pages named in the class rates between those points, and the sections which alternate with page 224, as shown on page 209, I believe it is.

Q. Does this tariff rate, Mr. Simpson, carry a standard intermediate clause?

A. I presume it does, but I couldn't state without inspecting the copy.

Q. And, therefore, the class rates would not apply at the intermediate points?

A. May I refer you to section—to note 4 of the intermediate clause, and ask that that be read into the record?

Q. Do you know where it is, here?

A. Yes, sir.

19314 A. Original page 33-A of this tariff, referring to Commission's Exhibit 3061, letter not known, provides as follows:

"Subject to the provisions of notes 3, 4, 5, and 6, below, from any point of origin from which a commodity rate on a given article to a given destination and via a given route is not named in this tariff which point is intermediate to a point from which a commodity rate on said article is published in this tariff via a route through the intermediate point over which such commodity rate applies to the 19315 same destination, apply from such intermediate point to such destination and via such route the commodity rate in this tariff on said article from the next point beyond from which a commodity rate is published herein on that article to the same destination via the same route."

Note 5, one of the notes to which reference was made, provides:

"If the class rate on the same article via the same route from the intermediate point produces a lower charge than would result from applying the commodity rate under this rule, such commodity rate will not apply."

Now the next section—

Q. I don't think you need read any more into the record.

A. I can do it very briefly.

The next section applies to intermediate points and has substantially the same application and exception.

Q. And you, in your regular work, you are familiar with this Exhibit 3061-A?

A. I have used it, yes, sir.

Q. What is the name for it, as you refer to it; 3061?

A. We would refer to it by the freight tariff number and the I.C.C. number.

I couldn't give it without referring to the title 19316 page.

Q. But in your work as an expert on these matters you are familiar with this book (handing Exhibit 3061 to the witness)?

A. We would refer to it as Southern Pacific Company local export, import, and proportion freight tariff 160-G, I.C.C. No. 4661.

It may be identified under either of those numbers. I am putting both in for the record.

Q. So you are familiar with it and prepared to speak as you have with regard to it?

A. I will be glad to answer any question, but I may have to refer to it to refresh my memory.

Q. I wasn't thinking of questions that you were going to answer, but as to questions that you have answered. You are familiar with it as an expert and have a working knowledge of it?

A. Yes, sir.

19318 Q. Mr. Simpson, yesterday Mr. Wooden asked you whether or not you met Mr. Clous and, I think, he asked you about your conversation with Mr. Clous and I believe that you said that Mr. Clous called these rate books price books.

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Are you quite positive in your own mind, Mr. Simpson, that Mr. Clous did call them price books?

A. That is the best of my recollection.

Q. Are you quite sure that you didn't use the expression "price books" to him, first?

A. I wouldn't—

Q. —suggest it?

A. I would not care to state whether I did or not. I am not sufficiently clear in my mind whether I did or did not.

19319 Q. What did you call them to him?

A. My first conversation, in the opening of my conversation with him, I referred to them as rate books.

Q. Now if Mr. Clous should say that he has never called one of those anything but a rate book in his life and never even thought of them as anything but rate books would you still feel you are positive he said they were price books?

A. I am positive he used the expression "price books". I can't be positive that I did or did not use the expression, myself, before he did.

Q. You might have suggested that name to him?

A. I might have suggested the name to him.

Q. Where did you first hear the name "price books" in connection with these books?

A. From the representative of the Federal Trade Commission.

19323 I might state that when I refer to ten percent, or five percent, on rates, I am referring to an approximate figure which was prescribed by the Commission, and by which all rates end in either half cent or whole cent for very small rates, or even cents and whole cents for rates in excess of 20-odd cents. They have a table so as to prevent the use of complicated fractions in figuring rates, but the approximate result is attained as I have indicated.

19325 Q. Could you tell us, without making a search and compilation, approximately how many different tariffs, rates, rules, and regulations, summing them all up, there are that apply under any circumstances to the shipment of Portland cement in the United States, as of the present time?

A. My knowledge of mathematics is limited to analytical geometry, and there is no formulae in any mathematics that will compute such a figure as you ask me.

Q. Well, it runs into many, many thousands, does it not?—

A. Many millions.

Q. —as a matter of fact—

A. And beyond that.

Q. —as a matter of fact, there are billions of billions of railroad tariffs in total that apply to all commodities?

A. Not tariffs; but rates.

Q. But rates,—billions of billions?

A. Yes, sir.

19336 Mr. Wooden: Before putting on another witness, Your Honor, I think we had better dispose of this matter that Mr. Zimmerman brought up yesterday in the form of a proposed stipulation.

I think I may just as well say, while I am on my feet, that I have decided that I cannot accept the stipulation as proposed.

The request made at Kansas City as to certain information which has been provided in the form of a proposed stipulation and containing information that I did not call for and I consider that my request made at Kan-

sas City has not been complied with in form and substance, as I made it.

Mr. Zimmerman: Well, I am sorry that Counsel has taken that position.

19337 If I had realized that his request was made in any other shape than one which I considered—the manner in which I considered this, I wouldn't have taken the trouble of looking all that information up and I am very glad to withdraw the offer.

Mr. Wooden: I should like to say, further, that until Mr. Zimmerman started to present this matter on the record yesterday morning I had no inkling or idea that he was going to provide the information requested for tied up in the form of a stipulation or containing information which I had not asked for, but which he seeks to have me agree to, along with the information that was asked for.

Mr. Zimmerman: I am not asking Counsel to agree to anything except the witness who was on the stand, if recalled, would testify in accordance with the statement that was made.

If he doesn't desire to do that, it is too bad.

Trial Examiner Norwood: Well, the Counsel has made his statement of fact, which, of course, is not evidence in this case.

Mr. Zimmerman: It is not even a statement of fact, if Your Honor please; it was merely an offer.

Trial Examiner Norwood: But if the Counsel for the Commission wishes to elicit that information from

19338 the witness he may call him.

Mr. Zimmerman: Yes.

Trial Examiner Norwood: The chief objection seems to be that the Counsel gave you more than you asked for.

Mr. Zimmerman: Yesterday, as I told Counsel, I would be very glad to have Mr. Wecker brought here. He was in New York and I took the trouble of locating him and would have been very glad to have him here.

The fact of the matter is I may still be able to get him today if you would like to have it done.

Mr. Wooden: No. We had Mr. Wecker on the stand once and his memory was rather faulty—or, it was rather inadequate and I wanted information in record information.

Now I get something in the form of, you might say,

a refreshed recollection, with the witness not here on the stand.

Mr. Zimmerman: Well, he could have had the witness on the stand in Chicago.

Trial Examiner Norwood: Well,—

Mr. Zimmerman: I desire to answer Counsel's statement, if you please. He has criticized that witness' memory.

19339 I want to call attention to the fact that the Counsel knew the witness was available in Chicago, was in the room ready to go on the stand where the records of his company were available.

Counsel for the Commission saw fit not to call him until he went to another city several hundred miles away where he had no records available and now when he asked to have the records looked up, he doesn't want the information that the witness has taken the trouble and time to find for him.

Mr. Wooden: I want the information I asked for.

Mr. Zimmerman: That is all I have done; look up everything that you asked for.

19340 HAROLD W. BANGERT, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

19341 *Direct Examination.*

By Mr. Wooden:

I lived at Fargo, North Dakota. I am an attorney. I was employed as an attorney-examiner in the Chicago office of the Federal Trade Commission from, I think, July, 1931, to July 15, 1933.

Q. In the course of your employment by the Commission, will you state whether or not you ever had occasion to work on an investigation of the cement industry?

A. I did.

Q. Will you state, just generally, the kind of work you did on it and the length of time you spent on that investigation?

A. I would say that my work in the case extended over a period of, probably 3 months, 2 or 3 months.

I did investigational work and, generally, to determine the methods by which uniform prices were arrived
19342 at in bids on highway projects, State highway projects.

Q. Can you state what method of investigation you followed, in a general way?

19343 A. I interviewed officials and employees of cement companies, State employees, officials, and examined files of the companies, and the records of the States.

Q. Can you name any of the cement companies on which you called in the course of that investigation?

A. Yes; whether I have the correct names now I don't know, it is so long ago; but Cosmos Portland Cement Company, in Louisville, I believe; the Louisville Cement Company; the Lone Star in Indianapolis.

It seems to me I mad a trip to St. Louis, too. Oh, I have forgotten the name of the company down there.

Q. (Showing data to witness) I am showing you papers that have been marked for identification as Commission's Exhibits 2604-A to F, inclusive; 2605-A to E, inclusive, and 2606.

I will ask you to state where and when you first had any relationship, if you had any relationship, to those papers?

A. I secured these papers at the request of another attorney-examiner, a Mr. Charles M. Johnston, from the Marquette Cement Company in Chicago.

Q. Do those papers have any identifying mark of our own on them?

A. Yes; in the upper lefthand corner of each exhibit appears a letter "G," "H" and "I," respectively, written by me.

Q. Are you referring now to Commission's Ex-
19344 hibits 2604-A and 2605-A and 2606 (indicating)?

A. That's right.

Q. Do you have any mark on any of the other sheets there in the papers shown to you?

A. No, sir.

Q. Are those letters in the upper lefthand corner that you referred to in your handwriting?

A. Yes, sir.

Q. When was that handwriting placed on there?

A. Either at the time of securing the exhibits from

the Marquette Cement Company or immediately upon my return to my office in Chicago; as to the exact minute, I can't say.

Q. Can you say about when it was?

A. Well, I should say immediately after returning to the office, knowing my routine.

Q. Well, when was it?

A. As to date, you mean?

Q. Yes.

A. Well, about the 11th or 12th of July, 1933.

Q. Do you know whose handwriting appears on the upper righthand corner of Commission's Exhibits 2604-A, 2605-A and 2606?

A. I can't—I do know, but I can't identify it.

Q. All right.

Can you say from what person in the Marquette
19345 Company you obtained those papers?

A. I believe that I obtained them from Mr. Wecker.

Q. Do you have any recollection of what sort of a looking man Mr. Wecker was?

A. Well, it is my recollection that Mr. Wecker is a rather short, round, inclined to be fat. Now, understand, that I saw Mr. Wecker once in my life, as I recall.

Trial Examiner Norwood: State the circumstances. Tell us what made you think it was Mr. Wecker?

The Witness: I didn't know it was Mr. Wecker until —that I met—until this morning, discussing this matter with Mr. Wooden, I described a man—

Now, I don't know if Your Honor has ever had any experience with these mental flash-backs, but I just described my vague recollection of going into an office and securing papers from a man whom I assumed to be Mr. Wecker from the rest of the matters that have come to my attention in the case, and I described the man to Counsel, to Mr. Wooden.

Trial Examiner Norwood: Well, did you call for Mr. Wecker when you went into the office?

The Witness: I have no recollection.

Trial Examiner Norwood: Did you ask for him?

The Witness: I don't recall, sir.

By Mr. Wooden:

19346 Q. Was any aid given you by anyone in recalling your mental image of Mr. Wecker's—

A. No, sir.

Q. —general appearance?

A. No, no.

Trial Examiner Norwood: Well, was this interview in the president's office of this company?

The Witness: I have a recollection of going into an office, sir—but you understand this was in 1933 and we are now in 1939. I don't wish to go beyond my very definite recollection.

The witness identified Com. Ex. 3094 as a field report with reference to securing of certain exhibits from W. A. Wecker. Charles M. Johnston's name appears to 19347 be signed to it. The witnesses' initials appear below the signature. The witness put the signature "Charles M. Johnston" on there in his handwriting.

Q. Will you explain the circumstances under which that was done?

A. As I have stated before, Mr. Johnston was working on the same case, we worked together about at the time, the date of this report, and Mr. Johnston was called to Washington, or—he was called away by the death of some member of his family, anyway—and he asked me to finish a detail, namely, to go to Mr. Wecker's office, go to the Marquette Coment Company, and pick up some exhibits which he had previously arranged to secure. At his request, I did that.

Q. Will you state whether or not the exhibits that were referred to—or, rather, the exhibit letters which you put on the upper lefthand corner of Commission's Exhibits 2604-A, 2605-A and 2606, correspond to some of the letters that are covered in the interview reports to which you signed Mr. Johnston's name?

Mr. Zimmerman: I object to that.

Whatever is in the interview report speaks for 19348 itself. It is not necessary for the witness to make any comparison as to whether signatures, themselves—

Trial Examiner Norwood: He is simply trying to identify the papers as the papers referred to in the report. He may do that.

Mr. Zimmerman: That is not the question, sir.

Mr. Wooden: I will reframe the question.

Trial Examiner Norwood: I think the question is all right.

Read it.

Mr. Zimmerman: No, the question is objectionable; that is not the question.

Trial Examiner Norwood: Read the question, please.

(Last question read by Reporter.)

Trial Examiner Norwood: I think he might reframe it.

Mr. Wooden: I will reframe the question, if Your Honor please.

Trial Examiner Norwood: Yes.

You may ask him if they are the papers.

Mr. Wooden: That is just what I was about to do.

Trial Examiner Norwood: That he refers to.

By Mr. Wooden:

Q. Are the papers on which you put the letters "G," "H" and "I," some of the papers that are referred
19349 to in the interview report, Commission's Exhibit 3094, for identification (showing documents to witness)?

A. They are.

The witness identified Com. Ex. 3095 and 3096 as papers which were with the group of Exhibits 2604, 2605 and 2606A. Com. Ex. 3095 and Com. Ex. 3096 bear the same identifying letters, "F" and "J," in the same position as the other exhibits bearing the identifying letters
19350 "G," "H" and "I." The identifying letters "F" and "J" are in the witness' handwriting placed on there, approximately on the 11th or 12th of July, 1933; Com. Ex. 3094 is an interview report in which Com. Ex 3095 and Com. Ex. 3096 are referred to; Com. Ex. 3097 as a paper which the witness secured on June 3, 1933, from the officials of the Kosmos Cement Company in Louisville. It bears, in the upper right hand corner in the witness' writing, Kosmos Exhibit 3; 1-7272; H. W. B.
19351 6/3/33." The writing was placed on the exhibit at the time it was secured in examining the files of the Kosmos Cement Company. The witness came upon an original of an interoffice communication with a pencil memorandum. At his request the company prepared this copy. The witness knows the party referred to as Mr. E. M. Clancy; he does not know Mr. Bennett. He knows who Mr. Bennett was from information secured from Mr. Clancy. Mr. Bennett was, the witness believes, an employee of the company, a salesman, as he recalls. Mr.

Clancy was the sales manager of the company. The witness has no independent recollection who Mr. George Pearson is.

Mr. Wooden: That is all I have to ask Mr. Bangert.

Trial Examiner Norwood: Examine him.

Cross-examination by Mr. Zimmerman.

19352 Q. When were you admitted to the bar?

A. In 1931.

Q. Where?

A. Washington; that is, the first time I was admitted.

Q. Washington, D. C.?

A. Yes.

Q. And you were admitted to the bar a second time?

A. In North Dakota, yes.

Q. When?

A. I beg your pardon?

Q. When?

A. In 1934.

Q. What date in 1934?

A. I believe in July, as I recall.

Q. Don't you know?

A. I believe it was about July 15th.

Q. Are you guessing, now, or do you remember?

A. Well, I remember very distinctly taking the examination.

Q. I am not asking you about that, I am asking you the date of your admission.

A. No, I don't recall, exactly.

Q. What day of the month were you admitted to the bar in Washington, D. C., if you know?

A. I don't recall, exactly.

Q. Do you remember when you passed the bar examination or took the bar examination in Washing-

19353 ton, D. C.?

A. In December of 1930.

Q. What day?

A. As to that, I can't say; there were three or four days.

Q. When did you start to work for the Federal Trade Commission?

A. On July 1, 1931.

Q. How do you fix the date?

A. That was the end of a month-long vacation. I can recall very distinctly when I—

Q. Month-long vacation from where?

A. From several years of work. I had—

Q. What kind of work?

A. Going to law school and—

Q. This was the first job you had where you got paid for it, was the Federal Trade Commission?

A. Oh, no, sir.

Q. What kind of work had you done before you went to work for the Commission?

A. I worked for an attorney in Washington, while I was going to school.

Q. In the office, altogether?

A. Oh, no; on the Hill, at the Capitol, and Federal Trade Commission, here.

Q. Who was the attorney?

19354 A. Mr. Daniel R. Forbes.

Q. Then you went to work for the Federal Trade Commission. What kind of work did you do?

A. Investigational work.

Q. Well, what was the nature of the work; going around asking people questions and writing down things they said, and so forth?

A. Substantially.

Q. Is that all the work you did for the Federal Trade Commission?

A. Yes, that's all.

Q. Now, you called yourself an attorney-examiner; is that right?

A. Yes, sir.

Q. What did you do as an attorney, if anything, for the Federal Trade Commission?

A. Do you wish me to go into the detail of—

Q. Answer it any way you like.

A. I examined records, conducted interviews, and, as an attorney, prepared a preliminary brief on a case—not on this case—on cases assigned to me for the reasons and for the conclusions at which I arrived and made recommendations to the Chief Examiner's office.

Q. Did you do any of that work in the Cement case? That is, as an attorney?

19355 A. No, sir.

Q. All your work in the Cement case was as an investigator; is that it?

A. That is right.

Q. That comes within the term "examiner," does it?

A. I take it; yes.

Q. When did you first go to the State of Illinois in connection with any work with the Federal Trade Commission?

A. I have no recollection.

Q. When did you first go to the City of Chicago in connection with any work for the Federal Trade Commission?

A. My office was in Chicago.

Q. No; I am not asking you where your office was.

A. I beg your pardon—

Q. When did you first go to Chicago?

A. On July 1, 1933.

Q. Sir?

A. July 1, 1931.

Mr. Wooden: I don't think he understood your question, Mr. Zimmerman.

19356 A. I first went to the City of Chicago in the employ of the Federal Trade Commission on July 1, 1931.

Q. What was the first work you did, if you remember? What was the first case that you worked on?

A. An examination involving the complaint for false and misleading advertising against the Jeffery Jewelry Company, No. 1 South State Street, Chicago.

Q. Did you stay in Chicago, then, during 1931 and 1932, or did you travel about?

A. I traveled.

Q. And the same thing in 1933; you traveled in 1933, did you?

A. Yes.

Q. What was the first day of any work you did in connection with the Portland cement investigation?

A. As to the exact date, I don't know. I would imagine it was in May.

Q. You don't know except what you imagine about it, is that right?

Q. You don't know except what you imagine about it, is that right?

A. I surmise it was in April or May.

Q. Why do you imagine it was in May?

A. Because I recall spending two or three months on this case.

Q. Do you know, now, whether it was two or three months?

A. No, sir, I don't.

19357 Q. And can you tell us the exact date when you did the last piece of work on this cement case?

A. Yes.

Q. What day was that?

A. The 12th of July, 1933.

Q. How do you fix that date?

A. From the interview report which I have just read.

Q. You didn't write that interview report, did you?

A. No, sir.

Q. So far as you know that was dictated by Mr. Johnston, wasn't it?

A. I know, definitely, it was dictated by Mr. Johnston.

Q. You know definitely it was not dictated by you, do you?

A. Yes, sir.

Q. Did you hear Mr. Johnston dictate it?

A. No, sir.

Q. Then why do you say you know he dictated it?

A. Because I am familiar with the office routine in Chicago.

Q. So you think because you are familiar with the office routine in Chicago he must have dictated it, is that it?

A. No, sir.

Q. You didn't hear him; did you?

A. No.

Q. And you didn't see him at the moment when he was dictating it did you?

19358 A. I don't suppose that I did.

Q. And you can't say, now, that you were present at the time that he dictated it, can you?

A. No, sir.

Q. Can you say whether you were actually in the confines of the office on the very day when he dictated it?

A. No, sir.

Q. As a matter of fact, you have no recollection at all

or any knowledge of the facts and circumstances surrounding the dictation of that report, have you?

A. I have; yes, sir.

Q. What?

A. Mr. Johnston dictated a portion of that report—

Q. Did you hear him?

A. No.

Q. All right. Now I want you to tell me what you know of your own knowledge and not what you think.

A. All right.

Q. You, as a lawyer, know the difference between fact and suspicion and hearsay and all that sort of thing, don't you?

A. Yes, sir.

Q. You answer these questions just as you think a lawyer ought to, please.

What, of your own knowledge, do you know as to the exact facts and circumstances as to the dictation of 19359 that report?

A. Mr. Johnston told me that he had dictated a report—

Q. Now, that is hearsay, isn't it?

A. As a lawyer, if you will let me finish—

Q. Is that hearsay?

A. Just a minute—

Trial Examiner Norwood: Let him answer the question.

By Mr. Zimmerman:

Q. Is that hearsay, or not?

Mr. Wooden: Your Honor, I object.

A. I am not sitting here in a judicial capacity—

Mr. Wooden: The witness is not appearing here as an expert on law and evidence.

Mr. Zimmerman: He is appearing here as a lawyer. We don't ask him to be an expert.

By Mr. Zimmerman:

Q. That's what somebody told you, not what you know of your own knowledge, isn't it?

Mr. Wooden: He has testified to that.

Mr. Zimmerman: Will you let the witness testimy, Mr. Wooden.

Mr. Wooden: Yes.

Trial Examiner Norwood: I will sustain the objection as to whether or not it is hearsay.

19360 Mr. Zimmerman: I have gone way past that. That is ancient history now.

The Witness: Do you wish me now to recount the circumstances—

By Mr. Zimmerman:

Q. I don't want you to tell me what somebody told you; I want you to tell me what you know of your own knowledge.

A. I can testify, of my own knowledge, as to what Mr. Johnston said; yes, sir.

Q. That is not what I asked you.

A. I am testifying as to the fact of his statement.

Q. That is all you know about it, is what he told you?

A. That is exactly it.

Q. I see.

Now, then, you say that—let me see that interview report that you referred to.

(Mr. Wooden starts to examine documents.)

Mr. Zimmerman: Let the witness pick it out, please, from the papers.

(Mr. Wooden hands a group of documents to the witness who picks a document out of same.)

By Mr. Zimmerman:

Q. Now, will you pick out the interview report that you have been referring to.

A. (Handing document to Mr. Zimmerman) Yes, sir.

19361 Q. How was it designated by number in this case?

A. Commission's Exhibit 3094, for identification.

Q. Let me see it, please.

(The witness hands document to Mr. Zimmerman.)

Q. Now this says in here: "The writer called upon Mr. Wecker and secured from him his answers to the questions propounded in Mr. Burton's letter of June 14".

A. Yes, sir.

Q. Now will you point out to me in any of the other papers that have been shown to you, here, this morning, if you can, any answer to any question that was contained

or propounded in Mr. Burton's letter that is referred to here.

A. There is no such thing in these exhibits.

Q. There are none of them there. Then this statement that "the writer called upon Mr. Wecker and secured from him his answers to questions propounded in Mr. Burton's letter of June 14—" must refer to some documents which have not been shown to you this morning, is that not so?

A. That may be.

Q. It sounds like it, anyway, doesn't it?

A. Yes.

Q. Let us go on with this report.

"These answers are attached hereto."

"These answers"—I am reading, now, from this Commission's Exhibit 3094.

19362 Which one of the answers that were referred to that I have just read about can you find for me, now, that was attached to that document, 3094?

A. Which one of the answers?

Q. Which one of the answers that is referred to there.

A. In the proper sense of the word "answer" there is none.

Q. Did you ever see those answers?

A. I assume—

Q. No, don't assume anything; just tell me the truth.

Did you ever see those answers that are referred to in this letter?

A. The exhibits referred to in that letter—

Q. No, I am not asking you about exhibits referred to, I am asking you about answers referred to.

Did you ever see any such answers?

Mr. MacIntyre: If Your Honor please, we must insist Mr. Zimmerman permit the witness to answer a question when Mr. Zimmerman asks it and not have Mr. Zimmerman cutting him off.

Mr. Zimmerman: That is what I am going to do, if I can.

Trial Examiner Norwood: Let the Counsel permit the witness to answer a question and then—

Mr. Zimmerman: I am asking him a question, very definitely, about the answers.

19363 Trial Examiner Norwood: (Continuing) —and then if they should be struck he can make the motion to strike, but I don't see the use of this rapid fire Police Court method—

Mr. Zimmerman: Why not? Here is a situation where there has been a gross misrepresentation of the face of these instruments.

Mr. MacIntyre: I resent the statement of Mr. Zimmerman—

19364 Mr. Zimmerman: I don't care how much you resent it; that is a fact.

Mr. MacIntyre: —that is, according to Mr. Zimmerman.

Mr. Zimmerman: No, it is according to these instruments.

Mr. Wooden: They were representative instruments made in the ordinary course.

Mr. Zimmerman: Yes, represented as being secured by Mr. C. M. Johnston, because his initials appear on there.

Mr. Wooden: Mr. Johnston testified on that.

Mr. Zimmerman: Yes, admitted that was not so.

Trial Examiner Norwood: Off the record from now on.

(There was a discussion off the record.)

Trial Examiner Norwood: Examine the witness.

By Mr. Zimmerman:

Q. Now, can you point out to me any answer to a question propounded in Mr. Burton's letter of June 14?

A. Yes, sir.

Q. Where is the answer?

A. The exhibits.

Q. Oh, what was the question?

A. I have no idea.

Q. Oh, you never saw the letter?

A. No, sir.

19365 Q. So you do not know, then, what was in Mr. Burton's letter, do you?

A. I won't arrive at that conclusion, no.

Q. Well, do you know or don't you?

A. No.

Q. Then, how did you know these things were referred to in Mr. Burton's letter?

A. I have no knowledge of the substance of these exhibits.

Q. Oh. Nor have you any knowledge of Mr. Burton's letter, have you?

A. No, sir.

Q. So when you signed, as you say you did, put your initials under "Charles M. Johnston" here—

Mr. Wooden: Now, that is not all of it, Mr. Zimmerman.

Mr. Zimmerman: Well, now—

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

19366 Trial Examiner Norwood: On the record.

I shall ask Counsel to complete his question.

Mr. Zimmerman: What was the question?

Trial Examiner Norwood: Read the question.

Mr. Zimmerman: Where I was interrupted, read just that far.

(Last question read by Reporter.)

Mr. Zimmerman: Now, just strike it out and we will go ahead without referring to that.

By Mr. Zimmerman:

Q. How long before you put anything on this Commission's Exhibit 3094 is it your best guess that this was dictated,—this 3094,—by Mr. Johnston; how many days?

A. It was—now you want my best guess?

Q. That is exactly what I am asking for now, is your best guess as to how many days.

A. I would guess the day before.

Q. You think it was the day before that you put something on here, this Exhibit 3094—that it was dictated?

A. That is—I would say.

Q. That is only a guess, is it?

A. That's a guess.

Q. Now, just what was it you put on this Exhibit 3094,—point it out (indicating)?

A. That is what I supplied to the body of the—

19367 Q. No, just what was it you put on there, with your own hand, if anything.

A. I wrote on here: "Charles M. Johnston, H. B."

Q. I see.

Have you any distinct recollection now as to the time of day that that was done?

A. No, sir.

Q. Have you any distinct recollection independently of any reminder as to the day of the month that it was done?

A. No, sir.

Q. Have you any memory at all as to who else, if anyone, was present when it was done?

A. No, sir.

Q. Did you have before you, at any time, Mr. Burton's letter of June 14, that is referred to in this report, Commission's Exhibit 3094 (indicating)?

A. Not—

Mr. Paulson: I object.

A. Not to my recollection.

Trial Examiner Norwood: Wait a moment.

Mr. Paulson: I object to that, that line of questioning. This same line to which I objected before. That exhibit has not been offered. A few questions might be permitted on the voir dire of identification of it.

19368 Mr. Zimmerman: Oh, maybe I am previous.

Mr. Paulson: But that question is improper.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: The objection is overruled.

Mr. Zimmerman: Now, may I ask, is it intended to offer any of these exhibits?

Mr. Wooden: Indeed, it is.

Mr. Zimmerman: Which ones?

Mr. Wooden: Do you have to know that right now?

Mr. Zimmerman: Yes, because I want to cros-examine this witness; I do not want to waste time.

Mr. Wooden: You can cross-examine him on any exhibits marked for identification.

Mr. Zimmerman: No, I want to know which ones you are going to offer in evidence. I am entitled to know that.

Mr. Wooden: I am certainly going to offer the exhibits, the papers, which the witness has testified were obtained from the Marquette Company.

Mr. Zimmerman: Which ones do you refer to?

Mr. Wooden: Commission's Exhibits 2604-A to F, inclusive; 2605-A to E, inclusive; and 2606.

Mr. Zimmerman: I see. Anything else?

Mr. Wooden: I had not intended to, and I cannot

19369 say at this moment whether or not I will; it depends somewhat on the course of the cross-examination.

Mr. Zimmerman: Oh, all right; but I am free to cross-examine on any or all of them?

Mr. Wooden: Oh, yes.

Mr. Zimmerman: Thank you; thank you.

Mr. Wooden: I turned them over for that purpose.

Trial Examiner Norwood: The objection is overruled.

Mr. Zimmerman: Now, will you also turn over Mr. Burton's letter of June 14?

Mr. Wooden: I do not have it right here, but no reason why you cannot see it.

Mr. Zimmerman: All right; thank you.

Mr. Wooden: We can locate it and let you see it.

It is a letter that was sent, I think, to all members of the industry, or at least—not all of them—a questionnaire letter.

By Mr. Zimmerman:

Q. Now, why, if you know, did you sign this document, Commission's Exhibit 2604? Why, if you know, did you put anything on there in small letters anywhere? Did anybody especially tell you what to put on there?

A. I placed on there identifying symbols for the guidance of the stenographer.

Q. Well, now, did anybody else tell you what to

19370 put on there?

A. I gather that I was told by Mr. Johnston.

Q. You think somebody else told you?

A. I—

Q. But you do not have any distinct recollection of it, do you?

A. No.

Q. Can you figure out—except by just a guess—why you used this particular hieroglyphic that does appear up here in the lefthand corner of this instrument which is marked Exhibit 2604-A (indicating).

A. Yes, sir.

Q. All right. Why did you start with that particular hieroglyphic, instead of some other?

A. Why did I start with the letter "F"?

Q. Is that "F"?

A. That's my "F."

Q. I am referring now to Commission's Exhibit 2604-A, and asking you what the letter is.

A. That's letter "G."

Q. Oh, it is?

A. Yes.

Q. Well, now, why did you use "G"—because you had used "F" on some other instrument?

A. The preceding one; yes, sir (referring to papers).

19371 Q. Yes.

Now, where is the preceding one? How is that marked?

A. (Referring to document) That's marked "F."

Q. It is? Is that your handwriting?

A. Yes.

Q. It is? The "F" is your handwriting (indicating)?

A. That's right.

Q. And underneath that "Secured from W. A. Wecker," is that your handwriting (indicating)?

A. No, sir.

Q. It is not?

And "7/12/33," is that your handwriting (indicating)?

A. No.

Q. And the "C. M. J.," is that your handwriting (indicating)?

A. No, sir.

Q. The only thing that is your handwriting is where it says: "Ex."

A. No, that is not mine.

Q. Oh.

A. The only thing—

Q. The only thing that is—oh, it is some very, very small character?

A. That's right.

19372 Q. Up here in the extreme righthand corner, is it (indicating)?

A. Yes, sir.

Q. Well, now, how did you happen to put that down in the righthand corner on that one and in the lefthand corner on Exhibit 2604-A, if you know (referring to document)?

A. If you will give me the rest of them I will show you, all in the group.

Q. All right. I will give you them all.

A. It was done this way (indicating)—made a note there (indicating). I believe that the one that is labeled "J" came at the bottom of the pile of exhibits (indicating).

Q. You think you did? You do not have any memory of it. You just know that "J" comes in the alphabet a little later on than "G,"—that is it, isn't it?

A. Yes.

Q. Yes.

A. And, in any event, the letter was written in this position (indicating).

Q. Do you remember that, or are you just figuring this out now?

A. Well, I will say—yes, I figured that out.

Q. I see.

Well, you really haven't any distinct personal recollection of it at all, you are just trying to reason from
19373 what you figure you might have done, according to what you call your routine; is that right?

A. Yes.

Q. Is that right?

A. Yes.

Q. I see.

Look at this document that is marked Commission's Exhibit 1901 (showing document to witness); did you ever see that before?

Mr. MacIntyre: May we inquire where Mr. Zimmerman got it?

Mr. Zimmerman: Yes, you can inquire but I am not going to answer just now; I am busy.

Mr. MacIntye: It appears to be a Federal Trade Commission document. We wonder how Mr. Zimmerman ever came with it in his possession.

Trial Examiner Norwood: Is it in evidence?

Mr. MacIntyre: No, it is not. It is from the confidential files of the Federal Trade Commission. We wonder how Mr. Zimmerman happens to have it in his possession.

Mr. Wooden: It is marked for identification.

By Mr. Zimmerman:

Q. Did you ever see that before (showing document to witness)?

19374 A. Mr. Zimmerman, I made many of these maps.

Q. Oh, you did. Did you make that one?

A. Oh, I don't know.

Q. Do you see your handwriting on these anywhere?

A. No, sir; no, sir.

Q. You made lots of them, though, did you?

A. Yes, sir.

Q. Now, can you find any other instrument,—find any other instrument in connection with this Cement case that

has any of these little "g's" or "f's" like you find on these that you have shown us here this morning?

19375 A. I haven't looked. I don't have access to the Commission's files.

Q. You have not looked for any?

A. No, sir.

Q. All right.

Mr. MacIntyre: Your Honor please, I think that Mr. Zimmerman should do us the courtesy of telling us when and how, and under what circumstances he came into possession of the document—

Mr. Zimmerman: Can't stop to be bothered with that now.

Mr. MacIntyre: —that should have stayed with us.

Trial Examiner Norwood: How?

Mr. MacIntyre: The one that should have been with us, it belongs to us, and we think he should do us the courtesy of telling us.

Mr. Zimmerman: I can't be bothered with that now.

Mr. Wooden: I assume that he will return it to us; that is all.

Trial Examiner Norwood: Counsel has refused to answer that, and I suggest that the examination proceed.

Mr. Zimmerman: All right.

By Mr. Zimmerman:

Q. Now, the only way that you are able to identify these papers that have been referred to as Commission's

19376 Exhibits 2604-A and 2605-A, and so forth, and 2606, at all, is because you find these little hieroglyphic marks, these very small letters, in the corner of them, that you think you put there, is that right?

A. I—

Q. That's all you know about them, is it?

Mr. Paulson: I object to the question; it calls for a summing up and a conclusion, which is apt to be exclusive, and it would be difficult to answer such a question, and it prejudices the witness.

Mr. Zimmerman: Your Honor, may I be excused for a moment to answer the telephone?

Trial Examiner Norwood: All right.

(Mr. Zimmerman leaves the room to answer the telephone in the anteroom.)

Trial Examiner Norwood: Read the last question, please.

(Last question read by the Reporter.)

Trial Examiner Norwood: The objection is overruled, and I will ask the witness to answer the question.

Mr. Zimmerman: Of the record.

Trial Examiner Norwood: Off the record.

(There was a short discussion off the record.)

Trial Examiner Norwood: On the record.

19377 Mr. Wooden: The witness did answer the question, as we heard, and I think that answer ought to go in the record. I understood the witness to say "No."

The Reporter: I heard no answer beyond the "I".

The Witness: My answer is "no."

Mr. Zimmerman: All right. I see.

Trial Examiner Norwood: We will recess at this time until 1:30 o'clock p. m.

(Whereupon at 12:05 p. m., a recess was taken until 1:30 p. m. of the same day.)

19378 Afternoon Session—1:45 P. M.

Trial Examiner Norwood: Proceed with the cross-examination.

HAROLD W. BANGERT thereupon resumed the stand and testified further as follows:

Cross-Examination by Mr. Zimmerman (Continued).

Q. Now, I asked you just before luncheon if you knew anything more about the exhibits 2604-A, and so forth, and 2605-A, and so forth, and 2606, than the small letter or mark that you had testified you put in the corner.

Now did you at any time put any marks other than those on those exhibits that you know of?

A. Not that I know of, sir.

Q. Have you got the exhibits right here, now, please?

A. I don't have them.

(Mr. Wooden hands documents to Mr. Zimmerman.)

Q. I notice on these exhibits that there is some handwriting in blue pencil on the back of them, that is not yours, is it (indicating)?

A. No, sir.

Q. You know nothing about who put that on there?

A. No.

Q. Or when it was put on there?

19379 A. No.

Q. And as to the red penciling on the exhibits, did you do that (indicating)?

A. No, sir.

Q. Do you know when it was done?

A. No, sir.

Q. Haven't any idea at all?

A. No.

Q. Can tell us nothing about it?

A. No.

Q. Do you know the handwriting, or initials, of C. M. Johnston well enough to identify them?

A. Yes, I do.

Q. (Showing documents to witness.) Will you look at this document here which is marked "Commission's Exhibit 1901"; state whether or not the initials that appear up here in the upper righthand corner are, in your opinion, Mr. C. M. Johnston's initials and his writing, or not?

A. It is my opinion that those are his initials; of course—

Q. You understand that is his writing, do you?

A. —I am not testifying as a handwriting expert.

Q. But that is his writing?

A. That's substantially like his.

Q. I see.

Now, you did not see, however, on the Exhibits

19380 2405, 2404, 2406 anything that looked like Mr. Johnston's handwriting, did you?

A. No, sir. Now, I am—

Mr. Wooden: Off the record. You said Exhibits 2404; I think you had reference to 2604 and so on.

Mr. Zimmerman: Thank you very much, I mean Commission's Exhibits 2604, 2605, and 2606.

A. I don't want to be confused as to the number of the exhibits.

Mr. Zimmerman: Thank you very much for calling my attention to that, Mr. Wooden.

By Mr. Zimmerman:

Q. Where is this letter that you referred to this morning?

Mr. Wooden: What do you mean, the letter of Mr. Burton?

Mr. Zimmerman: No, no, I mean the one which was numbered this morning and on which Mr. Bangert's initials appear.

Mr. Wooden: What is that? Do you mean Exhibit 3094 (handing document to Mr. Zimmerman)?

Mr. Zimmerman: Well, I do not distinguish between a letter and a report.

By Mr. Zimmerman:

Q. Now, this Commission's Exhibit 3094, at the bottom the letters "H.B.,"—are those yours?

19381 A. Yes.

Q. What kind of a pen did you use in making those letters with, if you know?

A. A Schaffer.

Q. Still got it?

A. Yes, sir.

Q. Got it with you?

A. Yes, sir.

Q. Will you take your pen and write for me the name "Charles M. Johnston," and the initials "H.B." as you usually write?

A. Now, to make this fair I should sit at a desk rather than up here, shouldn't I?

Q. Well, sit anywhere you please.

(Witness moves over to Counsel table and writes as requested.)

Q. Now, is this example which you have just written for me your usual and customary handwriting?

A. I have no consistent method of handwriting. I have no usual or customary handwriting. I am a typist; I very seldom write, so I have no typical form of writing.

Q. What makes you so sure you have no typical form of writing? Is it your best recollection that every time you write down something you write it a little differently?

A. To a lay eye, yes; to an expert, he could undoubtedly identify it.

19382 Q. You are not an expert, are you?

A. No.

Q. Suppose you write it down the second time for me, just what you wrote before, and compare them and see how it works out.

Mr. Wooden: I suggest the papers, Your Honor, be given numbers for identification.

Mr. Zimmerman: We will get around to it if we want to.

Mr. Wooden: If you don't want to, I do.

Mr. Zimmerman: Suppose you let me conduct this examination in my own way.

(The witness writes on a paper.)

By Mr. Zimmerman:

Q. Now, will you please mark for me the first one you did as "F" and the next one you did as "G."

(The witness does as requested.)

Q. Now, do you ever make your initials in any different manner than that?

A. Yes.

Q. Show me on a sheet which you may mark "H"—

Mr. MacIntyre: We again ask that these papers that are now being written on be marked for identification.

Trial Examiner Norwood: He is marking them so that we can distinguish them.

19383 By Mr. Zimmerman:

Q. Mark this one "H," then, and—

A. You mean in approximately the same size?

Q. I don't care. Do it in your own way; any size you please.

A. You want my initials?

Q. Your initials in any other way you are accustomed to writing them.

A. All right.

(The witness writes on a piece of paper.)

There is the customary method.

Q. I observe on this instrument that you have marked "H" you have used an entirely different form of initial than the one you put on "G."

A. That is very true.

Q. Why do you do that?

A. One is an approximation of the signature and the other is an initial; if you can understand that.

Q. One is an approximation of a signature.

Now, which did you use, customarily, in marking exhibits that you obtained when you went around and acted as an investigator for the Trade Commission, in 1933?

A. I use "H.W.B."

Q. How do you account for the fact that you signed 3094 in the peculiar fashion, as "H.B."?

A. As I say, I have no consistent method of handwriting.

19384 Q. No special way of accounting for it; you just happened to do it; is that it?

A. That is right.

Q. But if it had been an exhibit that you obtained, you think you would have probably used some different form of initial, do you?

A. I would use a standard form, yes.

Q. Now, if you please, I would like for you to make on this paper which you mark "I"—

Mr. Wooden: Again, Your Honor, I urge each of these papers be given a number for identification.

Mr. MacIntyre: Mr. Zimmerman is referring to "this paper" and "that paper" and the record will fail to show which one he is talking about. We ought to have identifying numbers on them as Commission's exhibits, for identification, so we will know which one he is talking about when he says "this one," "that one," and "the other one."

Trial Examiner Norwood: Has the Counsel any objection to having them numbered?

Mr. Zimmerman: I would like to have them marked in the particular way I am asking to have them marked.

Trial Examiner Norwood: Since you are going into several of them we should have them marked for identification in the regular way.

Mr. Zimmerman: If the Examiner please, is there

19385 any reason why I should be compelled to have anything I am using here in testing this witness' handwriting marked for identification at all, if I don't want to?

Trial Examiner Norwood: Yes; to identify them with the testimony that is going into the record.

Mr. Zimmerman: I am not even bound to offer them in evidence.

Trial Examiner Norwood: You are bound to have them marked, if you are going to use them in questioning.

Mr. Zimmerman: How would Your Honor like to have them marked?

Trial Examiner Norwood: Let me see those, please.

(The documents were handed to the Trial Examiner.)

Trial Examiner Norwood: Let the paper marked and referred to as being marked "F" be marked for identification as Respondents' Exhibit 187.

The paper marked "G," 188.

The paper marked "H," 189.

Mr. Paulson: I think it has to go further than marking for identification. We are going to have an incomplete record unless those papers are in evidence. Your Honor will not get a chance to see what this witness is testifying to. The testimony will not be complete with the papers only marked for identification.

Trial Examiner Norwood: He can offer them, or
19386 not, as he wishes. Just so they are marked and we are certain what we are talking about.

(The papers referred to, were thereupon marked for identification as Respondents' Exhibits 187, 188, and 189.)

Trial Examiner Norwood: Go ahead.

Is there a question pending?

(Question read as follows:

"Q. Now, if you please, I would like for you to make on this paper which you mark 'I'—")

Trial Examiner Norwood: Finish your question.

Mr. Zimmerman: I think you may just take a sheet of paper there, a blank sheet of paper.

(The witness takes paper.)

By Mr. Zimmerman:

Q. Now, will you please write the name "Charles M. Johnston," and then will you please write the letters "F," "G," "H," and "I."

(The witness sits at table and writes.)

Q. Separately.

(The witness writes.)

Q. All right.

Now, have you tried to make those letters look as much like the letters that you used on these various exhibits as possible?

19387 A. I have tried to make them of the size.

Q. I see, just tried to make them the same size.

A. Yes.

Mr. MacIntyre: Your Honor, we ask that that paper be marked for identification.

Trial Examiner Norwood: Mark it Respondents' Exhibit, for identification, 190.

(The paper referred to was thereupon marked for identification as Respondents' Exhibit 190.)

By Mr. Zimmerman:

Q. You recall, do you, Mr. Bangert, that under date of March 20 you wrote to Mr. Wooden about these exhibits, having received photostatic copies from him about them?

A. Yes.

Q. You sent him a telegram about it, too, did you not?

A. Yes, sir.

Q. And you referred to the interview report which has been marked 3094—Commission's Exhibit 3094; do you recall that?

A. I don't recall what was in the letter and telegram.

Q. Let me refresh your recollection about it.

Did you say in there:

"The interview report signature is mine beyond any question, and just as definitely the notations on the exhibits are not mine."

Do you recall that?

19388 A. Yes, sir.

Q. Now, just when was it that you left the employment of the Commission in 1933?

A. July 15.

Q. When was it that Mr. Johnston left, if you know?

A. About July 11, I think, or 11th or 12th.

Q. How do you fix the day or date when Mr. Johnston left, if you do fix it?

A. Yes; Mr. Johnston's brother died in Michigan. We were both leaving the Commission on the 15th. His brother died, I believe, on the 10th or 11th, and, as I say, about that time Mr. Johnston had to leave, and, consequently, I got into this.

Q. Now, have you any recollection at all as to the day of the week upon which you think you went to the Marquette offices?

A. No, sir.

Q. Can you tell us what floor of the building they were on?

A. No, sir.

Q. Can you tell us where the building was located?

A. I know where it is located now.

Q. You do now?

A. Yes, I do know now.

Q. You didn't know until when?

A. My recollection of it was it was down town
19389 in Chicago, that is, in the loop area.

Q. Yes.

A. I had no knowledge of where the building was until I checked up on the address. I asked some one of the Counsel here what the address was. All I knew it was down town.

Q. Yes.

A. I understand it is something on South Dearborn.

Q. That was when that you asked him?

A. This morning.

Q. And that was the first time that you really got it definitely in your mind that you had seen a Mr. Wecker there, isn't it?

A. Oh, no, sir.

Q. Oh, wasn't it?

A. Now, just a moment. It was the first time,—when I saw the interview report I immediately connected someone whom I had interviewed with the name "Wecker." I knew that I had talked to someone in the Chicago office.

Q. You saw that interview report this morning?

A. No, I had a photostatic copy of it.

Q. Yes.

A. Although I did not recall his name.

Q. You did not know it?

A. No.

Q. And you don't recall any particular conver-
19390 sation that occurred, either, do you?

A. No, sir.

Q. Nor who, if anyone else, was present?

A. No, sir.

Q. I would appreciate it very much if you would make one more sample of writing for me.

Well, wait for that, because you have to get down off the stand.

A. All right.

Q. So we will just wait. Let us go ahead with this letter.

Do you know anything about what the custom was as to the series of lettering that would be used in marking exhibits such as those you were collecting in 1933 on the Cement exhibit?

A. Yes, sir.

Q. Tell us what that custom was?

A. A—

Q. How you would select a letter.

A. There was no particular—there was no fixed form. We started with the letter "A," or I did—some of the attorney-examiners used the letter "one," I used letters, and, for instance, if a group of exhibits from one company, we will say Marquette—a group of exhibits would start out with "A," subsequently from some other officers in the company—my interview reports, anyway, and that is all I can testify to—

19391 Q. Yes.

A. My interview reports would go on from the last letter.

Q. Well, in other words, if you saw an exhibit in a series with the words "Ex. N" on it, would you deduce from that that there had been other exhibits marked from A down to M that were obtained from the same source as that exhibit that was marked "N"?

A. Not from identically the same source.

Q. Might be only the same subject matter?

A. Oh, chances are not—

Q. Well, which way would it be?

A. In my case, it would be from the same company, and pertained to cement.

Q. Well, sometimes you got things from the State of Illinois, for example.

A. That is right.

Q. And then if you saw one that was marked "Ex. N," with some memoranda on it showing it was obtained from the State of Illinois, would you deduce that there had been other exhibits in that same series there from A to M?

A. Yes, sir.

Q. Obtained from the same source?

A. Yes, sir.

Q. The State of Illinois?

A. Yes, sir.

19392 Q. Pertaining to the same subject matter?

A. Yes.

Q. And at about the same period?

A. Yes.

Q. Now, do you know anything about what exhibits were marked A, B, C, D, E?

A. No, sir.

Q. That any such that were obtained from the Marquette Company in connection with this Cement matter are about this period?

A. No, sir.
Q. In July, 1933?
A. I have no knowledge.
Q. You never saw any such document?
A. Never saw any such.
Q. Know nothing about any such?
A. No.
Q. So you cannot tell us, of your own knowledge why the first letter that was used there was "F" or "G," can you?
A. No, I can't.
Q. Now, you have told Mr. Wooden that it seemed quite possible that Mr. Johnston had dictated the interview report a day or two before he left Chicago. That is correct, is it not?
A. Yes, sir.
19393 Q. And that it was quite possible that you, at Mr. Johnston's request, had designated the letter?
A. Yes.
Q. Was that about the extent that you felt you could go in the matter of certainty in that regard?
A. Yes, I would say so.
19394 Q. And you would not now be positive as to whether you selected the letters or Mr. Johnston selected the letters or somebody else selected the letters, would you?
A. I would be positive that I did not select the letters.
Q. You would. When did you become positive of that?
A. If I had selected the letters and dictated the interview report the lettering would have started with "A".
Q. Well, by selecting the letters, would you mean by that that you designated them to the stenographer in any way, or did Mr. Johnston do it?
A. I did it.
Q. But you don't know why you happened to use those particular letters, do you?
A. From my independent recollection, no.
Q. Did you see the stenographer write anything on these Exhibits 2604, 2605, and 2606?
A. No, sir.
Q. Did you see anybody do anything to them at any time?
A. To the best of my knowledge, no. I have no recollection of it.

Q. As a matter of fact, you haven't any very distinct recollection of anything about this except in so far as your recollection has been refreshed to some extent by those small letters that you think are the same as the kind of letters you sometimes used in designating exhibits,
19395 is that not so?

A. No, that is not right.

Q. What else do you distinctly recall, other than what somebody told you? I do not want you to tell me what somebody had told you.

A. I distinctly recall Mr. Johnston asking me—

Q. I am asking you—

A. You are asking for a fact as to what I recall, now.

Q. Outside of what somebody said to you.

A. Mr. Johnston—then I shan't say anything that he said.

He asked me to call—

Q. Now—

A. Now wait, now, just a minute—

Q. All right, go ahead.

A. Well, it makes no difference to me—

Q. You go ahead except I have asked you distinctly not to repeat anything anybody said to you.

A. I am merely attempting to testify as to a fact and—

Q. Do you know anything at all except what somebody said to you?

A. Yes.

Q. All right, now, tell us one thing you know about these exhibits outside of what somebody said to you.

A. I know that I called at the Marquette Cement Company and picked them up.

19396 Q. But you don't know when or what time of day or what day?

A. I have no independent recollection of that; no, sir.

Q. Can you tell us anything more about the individual that you saw there than you already have told?

A. No.

Q. That is the extent to which you can describe the gentleman, is it?

A. And I preface that statement that that was a very hazy recollection of the type of man.

Q. Well, in your telegram to Mr. Wooden on March 20 you said: "I have slight recollection of securing exhibits." Is that not so?

A. That is right.

Q. Now, nothing has occurred to strengthen that recollection since you have been here; you had the exhibits all before you at the time you sent this telegram, didn't you?

A. That is true.

Q. Well, has anything new occurred, now, that has thrown any new light on it at all?

A. Well, of course, I have examined these records.

Q. Yes.

A. As the originals, and I have examined the photostats.

Q. Yes.

A. And during the course of the past—whenever that letter was written, a few weeks, I have attempted
19397 to recall the circumstances surrounding the securing of those exhibits.

Q. And then, besides that, one of the Counsel for the Commission this morning assured you that it must have been Wecker that you talked to, is that not so?

A. It is not true.

Q. It is not true?

A. No, of course it isn't.

Q. In fact, they never said anything even to that effect in substance, did they?

A. No, sir.

Q. You are sure of that?

A. I am very positive.

Q. Even when he asked you to describe the gentleman?

A. He didn't ask me to describe the gentleman.

Q. Who did?

A. I suggested it to him.

Q. And then didn't he say that that, undoubtedly, was Mr. Wecker?

A. No.

Q. Nobody did, did they?

A. No.

Q. So how did this flash come over you this morning? The name Wecker wasn't mentioned to you, was it?

A. By whom?

Q. Anybody.

19398 A. Oh, yes; of course.

Q. Who mentioned it to you?

A. I discussed it with Counsel for the Commission.

Q. Who mentioned it to you?

A. I don't know what you mean by the word "mentioned". I discussed—

Q. And what is your best understanding of the word "mentioned"?

A. Now we are getting into definitive matters and they are very complicated.

Q. There is nothing very complicated about the word "mentioned". What do you believe it to mean?

A. To bring the name to my attention.

Q. Or repeated it?

A. Yes.

Q. Who, if anyone, did that?

A. No one.

Q. Now you say that no one did?

A. No. I brought the matter to Mr. Wooden's attention.

Q. Now you have told us everything that you know about this whole transaction, have you?

A. To the best of my knowledge.

Q. I want to ask you to step down here, now, and write just one more thing for me, if you will, please.

(The witness leaves the witness stand and sits at 19399 Counsel's table.)

Q. Suppose, on this piece of paper, which will be marked, I take it—

Mr. Zimmerman: Will the Examiner mention the number, so that we will be sure and have it correct?

Trial Examiner Norwood: Let him write it and then we will get a number.

By Mr. Zimmerman:

Q. Will you please write on this sheet of paper a letter "G" as you would make the letter "G" under circumstances that were similar to those that occurred at the time you think you marked it on these exhibits.

A. As nearly duplicating my recollection of the exhibits as possible?

Q. Just as you usually did do it; not trying to duplicate anything, but just as you usually did do it.

A. I tried to put it in the same position.

Q. You did.

Trial Examiner Norwood: The paper will be marked for identification as Respondents' Exhibit 191.

(Thereupon the sheet of paper referred to was marked Respondents' Exhibit No. 191, for identification.)

Mr. Zimmerman: That is all. Thank you very much. Mr. Bangert.

19400 Now let me ask—Mr. MacIntyre was a little bit disturbed about this Commission's Exhibit 1901. You say that is something from the confidential files of the Trade Commission that has been marked in evidence?

Mr. MacIntyre: No, I apologize for saying it was not marked in evidence because I checked, over the lunch hour, and found it was marked in evidence in Chicago and has since been received in evidence.

Mr. Zimmerman: You were a little excited about it this morning.

Mr. MacIntyre: Not excited. I asked you to answer my question and you refused to do it. I asked you what the paper was.

Mr. Zimmerman: I will return it to the Examiner. It appears this was inadvertently picked up in Chicago by somebody in my organization and brought back here and I have, I hope, dutifully returned it now.

Trial Examiner Norwood: Has this been received in evidence?

Mr. MacIntyre: The original, of which Mr. Zimmerman or some one received a photostat, was received in evidence.

Mr. Zimmerman: Is this the original?

Mr. MacIntyre: No, this is a photostat of the 19401 document in evidence.

Mr. Zimmerman: Then it is possible I am entitled to keep that.

Mr. MacIntyre: I don't know how that came to be in your possession.

Mr. Zimmerman: Don't you know I do get copies of exhibits received in evidence from the Official Reporter?

Mr. MacIntyre: No, I don't know that.

Mr. Zimmerman: I don't know if I am due to return it; if I am, I will, but if not, I will keep it.

Trial Examiner Norwood: It is marked as a Commission's Exhibit.

Mr. Zimmerman: Let me ask the Reporter; is that an original or copy?

The Reporter: That is a copy.

Mr. Zimmerman: If it is a copy it would appear I have a right to keep this since the original must be here and I have paid for this.

Trial Examiner Norwood: Any further cross-examination?

Mr. Leisure: May I ask about this exhibit having to do with Kosmos?

Trial Examiner Norwood: Yes.

By Mr. Leisure:

Q. I notice there is some pencil notation. Is that 19402 your writing? (Indicating)

A. No.

Q. Is the writing yours at the top of the page (indicating)?

A. Yes.

Q. You don't recall the red ink writing at all, as I understand it?

A. No.

Q. But the writing on the upper right is in your handwriting?

A. Yes; that is definitely mine.

Redirect Examination by Mr. Wooden.

Q. Do you know, Mr. Bangert, when the red ink notation on Exhibit 3097, for identification, was placed on there?

A. No, sir, I do not.

Q. Can you say whether or not it was on there when the paper first came into your possession?

Mr. Leisure: He has already said, in answer to my question, he didn't recall it at all and he has said in answer to Mr. Wooden's question he doesn't know when it was placed there.

It seems to me that answers this question.

Trial Examiner Norwood: Let him answer it again.

A. I can arrive at some conclusions here, but—inasmuch as I would pick up an exact copy—

19403 Mr. Leisure: No, I object to that. The witness has already said he doesn't know when it was placed on there.

Trial Examiner Norwood: The witness can make any further explanation of his answer he wants to.

Mr. Leisure: As to any statement of fact, but he is now going to surmise how it got on there.

If he knows we want to know, too, but he has already said he didn't know.

Trial Examiner Norwood: Do you wish to make any further statement about it?

The Witness: I would say, inasmuch as I know I picked up an exact copy and the original had a pencil memorandum on it, I assume that that—

Mr. Leisure: I object to what he assumes.

Trial Examiner Norwood: The objection is overruled.

The Witness: (Continuing) —I assume that the notes —the words, "penciled notation" were put on by the stenographer who prepared the copy.

Trial Examiner Norwood: Where was the copy prepared?

The Witness: In the Kosmos office in Louisville.

Mr. Wooden: I will offer this 3097, your Honor.

Mr. Leisure: May I ask a question on the voir
19404 dire about it?

Trial Examiner Norwood: Certainly.

Examination on the Voir Dire by Mr. Leisure.

Q. Mr. Bangert, you told me you didn't recall this at all, didn't you?

A. Yes.

Q. And you told Mr. Wooden you didn't know when that was put on there?

A. That is true.

Q. So that any statement with respect to it would have to be a guess or an assumption on your part, wouldn't it?

A. That is true.

Mr. Leisure: I object to the notation going in, your Honor.

I also object to the body of the instrument as being incompetent, irrelevant, and immaterial.

This case has to do with portland cement. The body of the instrument indicates it deals only with high early strength. It is, therefore, incompetent, irrelevant, and immaterial; outside this case, as far as this case is concerned. It has nothing to do with portland cement.

Trial Examiner Norwood: Anything further? Any further objection?

19405 Mr. Zimmerman: No; I am not interested in it. I don't know anything about it.

Trial Examiner Norwood: What marks on here are there that you have serious objection to, there, Mr. Leisure?

Mr. Leisure: Your Honor, I object to the entire exhibit as not having been shown to have had any connection with this case.

High early strength is no more in this case than if it were some other commodity.

Trial Examiner Norwood: I am speaking about marks.

Mr. Leisure: As to the marks, the red ink "penciled notation" on the side have not been, in any way, identified as to who made them or as to when they were placed there.

Trial Examiner Norwood: And you mean the typewritten matter opposite that, too?

Mr. Leisufe: No, I merely mean the red notations.

19406 Trial Examiner Norwood: Well, I shall overrule the objection and receive the exhibit, as marked, with the exception of the words in red ink "penciled notation"; that may be considered if there is any further identification of it.

(Com. Ex. 3097 was offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Bangert, referring to Commission's Exhibit 3094, for identification, I think you said something to the effect that some portions of that report to which you signed Mr. Johnston's name were of your authorship; is that correct (indicating)?

A. Yes, sir.

Q. What portions?

A. The letters—the letters "F," "G," "H," "I," and "J."

Q. Why did you assume to put any letters such as that in a report over Mr. Johnston's name?

A. Because I—he left the office and I did it at his request.

Mr. Zimmerman: I want to move to strike out that last answer. It is purely conversation. It is objectionable from the standpoint of being an answer to a question that was asked as if it was cross-examination of a witness who, I call attention to the fact, is not an industry witness, but is as thoroughly a dyed-in-the-wool Trade Commission

witness as can possibly be. For that reason we
19407 ought to be a little careful not to cross-examine him when he is still being examined on redirect.

Mr. Wooden: Do you think to ask a question "Why" is cross-examination?

Mr. Zimmerman: I think that you knew when you asked the question what you expected to elicit by it.

Trial Examiner Norwood: Read it.

Mr. Zimmerman: And I think the question was objectionable, and the answer, too, and I move it be stricken out.

Trial Examiner Norwood: Read the question and the answer.

(Last question and answer read by Reporter.)

Trial Examiner Norwood: The motion is denied.

Mr. Wooden: Will you mark these papers, please?

(The document referred to, consisting of two sheets, was marked for identification as Commission's Exhibit 3098-A and 3098-B.)

By Mr. Wooden:

Q. (Indicating) Showing you papers marked Commission's Exhibits 3098-A and B, for identification, Mr. Bangert, do you know anything about that document, or did you ever become familiar with that document, rather, in the course of your employment by the Federal Trade Commission?

A. I can't say that I did; no, sir.

19408 Mr. Wooden: For information of Counsel, I will state—

Mr. Zimmerman: I do not want any statement on the record from you about this at all. If it is off the record I have no objection to it, but I have not asked you for any information.

Mr. Wooden: You did ask for this.

Mr. Zimmerman: Or any statement on the record.

Mr. Wooden: You did ask for this.

Mr. Zimmerman: Well, I am exculpating you now, then, if that be possible in the circumstances. I do not desire a statement from you on the record unless you want to take the witness stand and let me question you.

Mr. Wooden: I would have no objection to that, as far as that is concerned.

Mr. Zimmerman: Well, if you think that is a proper thing to do.

Mr. Wooden: No, I do not think it is a proper thing to do.

Trial Examiner Norwood: Off the record.

Proceed.

Mr. Wooden: I am submitting this paper marked "Commission's Exhibit 3098-A and B," to Mr. Zimmerman, believing it to be the letter of June 14, 1933, of Mr. Burton that was referred to in the Exhibit 3094, for identifi-
19409 cation (indicating document).

Mr. Zimmerman: I am in nowise interested in what Mr. Wooden believes about it.

Mr. Wooden: All right, all right, that is the best I can do.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: I may add to that, if your Honor please, that is the document taken from the official files of the Commission as the carbon copy of the letter referred to—

Mr. Zimmerman: Please—

Mr. MacIntyre: —in so far as the records of the Commission show it to be, it was so taken from the records.

Mr. Zimmerman: The gentleman not having been sworn and questioned, I object and move the remark be stricken from the record as purely a voluntary, unauthorized and unauthenticated statement.

19410 MISS ELIZABETH CARROLL was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

19411 *Direct Examination by Mr. Wooden.*

I am a stenographer in the Federal Trade Commission, Chicago office, having been so employed [since] 1/16/1928. My duties in the Chicago office have been just general stenographic work; I work for all the attorney-examiners. I take dictation from all of them.

Q. Will you state whether or not you have ever handled exhibits that attorneys turned in with their notations, or interview reports?

A. At times.

Q. How frequently has that been?

19412 A. Not very often.

Q. Pardon me?

A. Not over half a dozen times.

Q. When you have so handled them, what has been your custom, or what have you done with them?

A. Marked the exhibit number—we used to mark just the initials of the attorney-examiner. We now use the full name, the date, and the initials of the examiner.

Q. (Indicating) I am showing you papers marked for identification as Commission's Exhibits 2604-A to F, 2605-A to E, and 2606, and will ask you to state where and when those papers first came to your attention?

A. They were handed to me to mark as exhibits.

Q. When and where?

A. Well, it is—

Q. And by whom?

A. Mr. Bangert.

Q. And when and where?

A. It would be about the 12th of July.

Q. What year?

A. 1933.

Q. On what do you base that answer that it would be about that date?

A. I marked them the date of the interview, that the interview was dated the 12th.

19413 Q. Do you mean to say that you marked these papers, themselves?

A. The date they were received from the informer.

Q. Well, now, referring to the handwriting in the upper righthand corner of Commission's Exhibit 2604-A, 2605-A, and 2606, do you know whose handwriting it is?

A. (Examining document) It is mine.

Q. Will you state, or read, just the portions of it that are in your handwriting?

A. "1-7272, Exhibit G, Secured from W. A. Wecker, 7 12 33, C.M.J. C."

Q. What is that small "c" you refer to?

A. That's my initial.

Q. Does that appear on each of these sheets that I refer to?

A. Yes.

Q. Will you state just where it appears?

A. It follows the "J."

Q. After "C.M.J."?

A. Uh-huh.

Q. When was that handwriting placed on there? I believe you told us that

A. Yes.

Q. When was your initial "c" placed on those sheets?

A. At the same time.

19414 Q. From what source did you obtain the information that led you to put the letters "G," "H," and "I" on those Exhibits 2604-A, 2605-A, and 2606 (showing documents to witness)?

A. They are on the lefthand corner here.

Q. Well, do you mean to say that you put them in the righthand corner because they were in the lefthand corner?

A. No, but those are the letters I must use on the exhibit.

Q. You have heard Mr. Bangert's testimony here today?

A. Yes.

Q. Do you have, or did you have any independent recollection, aside from his testimony, as to the source of those letters on the upper lefthand corner of those sheets?

A. No, but I would have to be told what to number them; I wouldn't know.

Q. In other words—well, I guess that is clear enough. Now, referring to Commission's Exhibit 3094, for identification (indicating); when did that paper first come to your attention?

A. I wrote it.

Q. You wrote it?

A. Yes.

Q. When?

A. The 12th of July, 1933.

Q. How do you know you wrote it on that date?

A. "E.C."—we always put the date up here that

19415 we wrote it, regardless of the date we got it in dictation (indicating on exhibit).

Q. Who dictated it to you?

A. Mr. Johnston.

Q. Can you say what you did with the papers, Commission's Exhibits 2604-A to F; 2605-A to E, and 2606, after you put the handwriting on the upper righthand corner?

A. We always turn the exhibits in with the report.

Q. Referring to Commission's Exhibit 3094 (indicating)—

A. That's the report.

Q. —is that the report?—

A. Yes.

Q. —that you refer to?

A. That's it.

Q. Now, showing you Commission's Exhibits 3095 and 3096, for identification; do those papers bear any handwriting of yours (showing documents to witness)?

A. It is my handwriting.

Q. Where?

A. "1-7272, Exhibit F, Secured from W. A. Wecker, 7/12/33, C.M.J.," initialed "e," "1-7272, Exhibit J, Secured from W. A. Wecker, C.M.J. e."

19416 By Mr. Wooden:

Q. Miss Carroll, you have said that you would not have put those letters "F," "G," "H," "I," and "J" on those various exhibits unless someone had so instructed you; is that right?

A. Yes.

Mr. Zimmerman: I object to the question. It is leading and suggestive.

Mr. Wooden: Oh, no.

Mr. Zimmerman: And unnecessarily so. There isn't any reason why Counsel should testify and then ask the witness to agree with him.

Mr. Wooden: That is just exactly what she did testify to.

Mr. Zimmerman: Well, that is all the more reason why it is not necessary for Counsel to do it.

Trial Examiner Norwood: The objection is sustained.

Mr. Wooden: Well, I will start over again.

By Mr. Wooden:

Q. Miss Carroll—

Where are Exhibits 2604?

Mr. Zimmerman: Haven't you gotten anywhere so far?

Mr. Wooden: No, on that point I will start over again.

Mr. Zimmerman: Here are the exhibits.

19417 Trial Examiner Norwood: Haven't you already covered that?

Mr. Wooden: It was a preliminary question, Your Honor. I thought I would make a short-cut, but I have got to start back over again now, because the objection was sustained.

Mr. Zimmerman: Oh, well, now—

Trial Examiner Norwood: Properly so, I think.

Mr. Zimmerman: Oh.

Mr. Wooden: All right. I am not complaining, except that—

Mr. Zimmerman: Well, you will ask it over.

19418 Q. From what source did you obtain the letters "G", "H", and "I" which appear on 2604-A, 2605-A and 2606, in the upper right-hand corner?

Mr. Zimmerman: I object to this. It has been asked and answered.

A. From the letters on the left-hand side.

By Mr. Wooden:

Q. Who, if anyone, instructed you to put the letters on the left-hand side upper corner over on the right-hand side?

A. I don't ever remember getting any instructions as to the side to place them on, but it would be natural to put them there and not put the letter over on the left-hand side.

Q. From whom, if anybody, did you get instructions to place those letters G, H, and I, that you put on the upper right-hand corner?

A. Mr. Bangert.

Mr. Wooden: That is all.

Mr. Zimmerman: May I ask, if the Examiner please, I would like Mr. Bangert to remain here. There is a matter that has come up that I do want to ask him a question about.

Mr. Wooden: Something on cross-examination?

Mr. Zimmerman: Yes, that is right.

19419 *Cross-Examination by Mr. Zimmerman.*

Q. How long have you been with the Trade Commission?

A. Since January 16, 1928.

Q. Always in Chicago?

A. Always.

Q. Is that your home?

A. Yes.

Q. And in 1933 how many stenographers were there in the office in Chicago?

A. Four.

Q. And can you tell me their names?

A. Helen Smith, Virginia Cady, Elizabeth Kline.

Q. Are they all still there?

A. No.

Q. How many of them are there now?
A. Virginia Cady and I.
Q. Just the two of you?
A. Yes.
Q. Do you know anyone in the office there that writes letters or memoranda and puts the initials M. M. on the document?
A. As the stenographer?
Q. Yes.
A. Yes.
19420 Q. Who?
A. Mary Morris.
Q. How many stenographers do you have now?
A. We have 11 stenographers, now.
Q. You know Mr. John H. Bass, don't you?
A. Yes.
Q. And about the 17th of March, 1939, you had a talk with Mr. John H. Bass about these same exhibits that you testified about, did you not?
A. Yes.
Q. And at that time Mr. Bass asked you what you knew about it, didn't he?
A. He asked me if that was my handwriting.
Q. And he asked you to tell him all you knew about it, in substance, didn't he?
A. Yes.
Q. And did you not say to him that you had no independent recollection of marking those three exhibits?
A. No, I remember marking them because it is my handwriting.
Q. Didn't you tell Mr. Bass at that time that you had no independent recollection of thus marking the three exhibits?
Mr. Wooden: I submit, Your Honor, she doesn't have to have, if she recognizes and identifies her own handwriting.
19421 Mr. Zimmerman: I can only cross-examine one witness at a time, if the Examiner please.
Trial Examiner Norwood: (Addressing Mr. Wooden) You can bring that out when your time comes.
Mr. Zimmerman: May I ask Counsel not interrupt with statements of that kind until I finish?
What was the last question, please?
(Question read.)

Mr. Zimmerman: Now that I have asked that I be not interrupted, will Your Honor rule upon my request, please?

Trial Examiner Norwood: I see no cause for ruling on that.

Mr. Zimmerman: I think there is when I am interrupted by voluntary statements that are suggestive to this witness when I am in the middle of cross-examination and I think Your Honor ought to sustain the objection and ask that it be not repeated.

Trial Examiner Norwood: That practice has been indulged in by both sides.

I shall exert my influence to reduce it to a minimum.

I don't see that Counsel has any cause at the present time to feel aggrieved.

By Mr. Zimmerman:

19422 Q. Did you not tell him, in substance, Miss Carroll, that you had no independent recollection of marking the three exhibits but that you did recognize the handwriting appearing thereon as yours?

A. I remember telling him I recognized the handwriting.

Q. And did you not tell him that was all you knew about it?

A. I said I didn't remember the case but it was my handwriting.

Q. And that was all you did know about it, was that it was your handwriting?

A. Yes.

Q. And that is still true, isn't it?

A. Yes.

Mr. Zimmerman: I think that is all.

Trial Examiner Norwood: And further cross-examination?

By Mr. Leisure:

Q. Just one question, with regard to these—we can use any one of these exhibits as a sample, I think.

I notice that on the back side of these exhibits, Miss Carroll, there are Trade Commission's stamps. For instance, I now refer to Commission's Exhibit 2606. Are you familiar with those stamps that appear on the back side of the exhibits?

19423 A. No.

Q. Do you know what they are?

A. That must be the Washington office. I am in the Chicago office.

Q. You don't know anything about those?

A. No.

Q. When I refer to "stamp" on the back, I had reference, so that the record will show, for instance; on 2606 it says: "Docket No. 8167" and there appears: "Taken from the file;" "page;" this particular one says, "obtained from Charles Johnston," and then the date appears.

That, as I understand, is a stamp that you say must be a Washington stamp?

A. It must be.

Q. It is not used in the Chicago office?

A. No.

Trial Examiner Norwood: Does that say "Docket"?

Mr. Zimmerman: Yes; "Docket".

It says on here, "Docket number 3167."

19424 Trial Examiner Norwood: Is it 3167 or 8167?

Mr. Zimmerman: I think it is 3, it is blurred a little bit, so it is hard to tell.

Trial Examiner Norwood: There is no 8167.

By Mr. Zimmerman:

Q. May I ask you to look at these exhibits, 2602 and 2605-A to E, and 2604 and state whether or not your handwriting appears anywhere on those stamps that are on the back? Is that your handwriting (indicating)?

A. No.

Q. Do you know whose it is?

A. No.

Q. But you are quite sure that it is not from the Chicago office?

A. We don't use stamps like that. We haven't got one.

Q. Well, now, was that on there at the time when you first saw those exhibits?

A. When I initialed them?

Q. Yes.

A. No.

Q. How do you know that?

A. Because they came to our office first.

Q. You have no recollection about it, have you?

A. No.

Q. You didn't examine them, did you?

19425 A. No, but I know they couldn't have been on there.

Q. Because you think it is not a Chicago stamp?
A. I know it is not a Chicago stamp.
Mr. Zimmerman: All right. Thank you.

Redirect Examination by Mr. Wooden.

Q. Miss Carroll, when you said all you knew about those papers, Commission's Exhibits 2604, 2605 and 2606, was that your handwriting appeared on them in the upper right-hand corner, did you mean to withdraw any of the previous statements that you had made about those papers?

Mr. Zimmerman: I object to that. That is merely an attempt to intimidate the witness. It is cross-examination, not redirect examination.

She has answered as honestly and fully as she could and I do not think this is a fair question.

Trial Examiner Norwood: I am going to let him have an answer to that question.

The objection is overruled.

Read the question.

(Question read.)

A. No.

Mr. Wooden: That is all.

Recross-Examination by Mr. Zimmerman.

19426 Q. Well, now, let me ask you; didn't you also say that your best guess with reference to those papers, in talking to Mr. Bass, your best guess was that in order to expedite the transmission of the case you numbered the exhibits together with a statement of from whom they were secured, and wrote the initials C. M. J. as indicating Charles M. Johnston? Did you not say that was your best guess, when you were talking to Mr. Bass?

A. I must have if—
Q. And that is what it is now, isn't it?
A. No, it isn't a guess now.
Q. Oh, you have changed your mind—
A. No, I haven't changed my mind.
Q. (Continuing) —since you have talked to Mr. Bass and talked to Mr. Wooden, have you?
A. No, I—

Trial Examiner Norwood: Give the witness a chance to answer.

Mr. MacIntyre: I don't believe the methods used by Mr. Zimmerman in the examination of these witnesses today are in good order. This is not a third degree nor a police court.

Trial Examiner Norwood: The point is well taken. Read the question there and let her answer.

Mr. Zimmerman: What is wrong with my examination?

19427 Trial Examiner Norwood: He has just told you.

Mr. Zimmerman: Well, I don't resent such statements, but I think there are not in order, either, coming from the source they did, or from any other source.

If there is any proper objection to make to any of my questions they should be made and ruled upon but that sort of thing is not proper in this record and I object to it.

Trial Examiner Norwood: The Counsel's manner doesn't appear in the record.

Mr. Zimmerman: No, it does not, and I do not care to have it commented upon from the source it has been commented on.

Trial Examiner Norwood: I don't think it is justified by the circumstances.

Mr. Zimmerman: What are the circumstances? What is it gives Mr. MacIntyre the privilege of commenting in that fashion?

Trial Examiner Norwood: The record shows.

Mr. MacIntyre: I would like to answer that question.

Trial Examiner Norwood: No more, now.

Mr. Zimmerman: Now may I have an answer to the question.

Trial Examiner Norwood: Read the question and

19428 answer.

(Last question and answer read.)

Trial Examiner Norwood: Finish your answer.

By Mr. Zimmerman:

Q. Do you want to finish your answer?

Mr. Zimmerman: I call attention to the fact that it was not I that interrupted her.

Trial Examiner Norwood: Finish your answer.

The Witness: May I have the question read again?

Trial Examiner Norwood: Read it.

(Question read.)

A. No.

By Mr. Zimmerman:

Q. It was a guess when you talked to Mr. Bass. That is what you told him?

A. I didn't remember the circumstances just at the time.

Q. Now you have talked to Counsel for the Commission since you have come here, have you not, about your testimony in the case here?

A. I don't know what you mean.

Q. Have you talked to anybody at all about your prospective testimony or answers to the questions?

A. I had no instructions as to what I was to say.

Q. I am not asking you about instructions. I am merely asking you if you talked to anybody before you went on the witness stand about the nature of your
19429 testimony?

A. No.

Q. Not at all; not to anyone?

A. Not as to what I was to say, no.

Q. Did anybody ask you what you knew about it?

A. No, I don't think they did.

Q. They did not; you are sure of that? You are positive, quite positive of that?

Mr. Wooden: I might say that we had these written reports—

Trial Examiner Norwood: Wait a minute. Let her answer.

A. I looked at the exhibits.

By Mr. Zimmerman:

Q. Yes, ma'am, but did anybody ask you what you knew about them?

A. No.

Q. And no one asked you what your testimony would be if you were asked any questions, did they?

A. No.

Q. And you didn't talk to Mr. Bangert about it?

A. No.

Mr. Zimmerman: All right. Thank you very much. that is all.

Mr. Wooden: That is all.

19430 (Witness excused.)

Mr. Zimmerman: Now, if I may ask my question of Mr. Bangert, please.

HAROLD W. BANGERT was thereupon recalled as a witness for the Commission and, having been previously sworn, testified further as follows:

Cross-examination (continued).

By Mr. Zimmerman:

Q. Mr. Bangert, with reference to the small letters that you found on the corners of these exhibits, 2604, 2605 and 2606, when did you first undertake to reproduce those letters with your fountain pen?

A. In my office in Fargo on the day I received the photostatic copies, in order to test my recollection.

Q. That was the reason for your writing to Mr. Wooden in reference to the matter, "For many years I have used the same fountain pen and with it I can exactly duplicate the signature on the interview report and very closely approximate the small lettering."

A. That is true.

Q. You have tried it out?

A. Yes, sir.

Q. And you practiced on it considerably before you came here?

19431 A. Oh, no.

Q. Not at all?

A. Not at all.

Q. Only once that you tried it?

A. Yes, sir, and that was in the office at the time I dictated the letter.

Mr. Zimmerman: That is all.

Trial Examiner Norwood: What were you doing that for; to verify your own signature?

The Witness: Yes, to verify my own recollection of having signed that report.

I knew I had the same fountain pen.

Trial Examiner Norwood: Didn't you recognize it without that?

The Witness: Yes, but to make sure—if you will put it in the record, since it is a factual statement; I read the letter, I think it was, that Mr. Wooden wrote to me; looked at the interview report; turned the interview report over on my desk and took a piece of paper and wrote

"Charles M. Johnston, H. B." and the small letters and turned it over and looked at it again.

Mr. Zimmerman: Did you save that piece of paper?

The Witness: No.

Mr. Zimmerman: All right.

19432 EVERETT MacINTYRE was thereupon recalled as a witness for the Commission and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Wooden.

Q. Mr. MacIntyre, referring to the writing and stamps that appear on the back of Exhibits 2604-A to 2604-F, 2605-A to 2605-E, and 2606, will you tell us what you know about that writing and those stamps?

A. During the fall of the year 1934 (Reporter's note: 1937) I was directed to have all documents in the files of the Commission which probably would be used or which possibly would be used in connection with its study of the cement case—that is, Docket 3167—marked on the reverse sides of the documents by stamp and by handwriting so that if and when the files were broken down and any of the documents were not used as exhibits in Docket 3167, that they could be returned to the informal files and to their proper places.

19433 I then had a stamp made bearing the Docket 3167 with lines showing from what file a particular document was taken, the page and from whom it was obtained—I mean by whom it was obtained, and from whom it was obtained, and the date, as shown by the interview reports attached to a file with such documents in the file.

19434 As to these particular documents, I noticed upon the examination of the files that they appeared in the file attached to a field report signed—apparently signed—by Charles M. Johnston, attorney-examiner. They were therefore marked by stamp on the back, as taken from files, the numbers of which appear on the back here—that is, of the informal files, and the pages, and as having been obtained by Charles M. Johnston from Mr. Wecker on July 12, 1933, because that was the information that appeared on the face of the interview report attached to them.

As to the pencil notation appearing in the upper right corner of the reverse side of each of these documents, those notations appear in my handwriting. They are all "Wecker H." Which gave them a particular classification according to the field report to which they were attached, so that they could be classified after the file was so broken down.

The handwriting appearing in the stamp under the words "Docket No. 3167" on the reverse side of each one of these, is the handwriting of "Feamster," a clerk who worked under my supervision and filled in the stamps after I had directed them to stamp the ones as the files were to be broken.

Q. Now, Mr. MacIntyre, you said that you started that work with that stamp, and breaking down the files, in the fall of 1934; is that correct?

19435 A. The fall of 1937. I would like to correct that, if I may, if the Reporter will change "1934" to "1937" where I had used it in the first instance I would appreciate it, because that was what I intended.

Mr. Wooden: That is all.

Mr. Zimmerman: Well, I would like to ask a question or two.

Trial Examiner Norwood: Yes; go ahead.

Cross-Examination by Mr. Zimmerman.

Q. When did you first see these documents, Commission's Exhibits 2604, 2605, and 2606, if you know (indicating)?

A. Well, I know I saw them in the fall of 1937.

Q. How do you fix the time?

A. I was assigned by the Commission to do this particular work during November, 1934 (Reporter's Note: 1937)—late October or early November.

Mr. Wooden: You mean 1934?

The Witness: 1937, if you please.

By Mr. Zimmerman:

Q. Well, now—

A. It was done within a few weeks immediately thereafter; I would say within two weeks. For that reason I would say it was in the fall, or late fall, or early winter, 1937.

Q. Your answer is not based, then, upon any dis-

19436 tinct recollection of these documents, but, rather, upon reasoning out the time when you began the

work, and the time when you finished it, and the stamp on the back, and your handwriting on the corner; is that right?

A. On the reverse corner.

Q. Yes.

A. I placed that on there within those few weeks, the fall of 1937, when I was handling those documents.

Q. Is that the extent of your recollection about these documents?

A. It is the extent of any clear recollection that I have.

Q. I see.

Now, then, can you tell us, therefore, in what manner they were attached to any other documents, from your recollection?

A. In the official file, with covers on both sides of the file, and with two large brass brads going through. They had washers on the reverse side of them, and the brads turned down.

Q. Do you say that because that was the rule, and the manner in which all documents were supposed to be handled, or because you have some distinct recollection as to these particular documents being so attached?

A. I have a distinct recollection that all of the files that I handled, and marked the documents in this 19437 manner (indicating) were so filed.

Q. But not as to these particular documents have you any independent recollection, have you?

A. I can answer you in this way, Mr. Zimmerman,—that I know that those documents were in one such file.

Q. Oh.

A. So bound, because it was only in those files that those documents were marked, or so marked as those are by me—

Q. I see.

A. —at that time.

Q. Oh, that is reasoning it out rather than by any distinct recollection of the documents, themselves, is it not?

A. That's true.

Q. Now, to go a little further with that,—what was the nature of the brass brad that went through the document such as these exhibits,—describe it a little bit to us?

A. Well, it is a long round-headed two-prong flat brass brad. They are turned down after going through; that is, after going through the file, and have a washer inserted on the back side of the file that was turned down.

Q. How many holes did such an instrument make through the exhibits, and at what part of the exhibits?

A. I—I can't tell exactly what part.

Q. That is to say, would it be the two corners, or at the top, or at the bottom, or at the side, or where?

19438 A. Ordinarily, it is at the top, Mr. Zimmerman, since you began to question me on that, though, I am beginning to have some definite and distinct recollection with respect to the manner in which these particular documents appeared in the file.

Q. All right. How did they appear in the file?

A. They had a thick—not such a thick—but a rather stiff oiled Manila sheet over which they were stapled, and that sheet was bradded.

Q. What kind of a staple was it?

A. Small wire staples.

Q. Oh. Now, you say that, do you not, Mr. MacIntyre, because you do not find on any of these instruments any holes such as you would describe as having been made by the brass brad?

A. No, I did not say it because of that. I say it because I now have a distinct recollection that these particular documents, as well as many others that were taken from those files at the time they were broken down, did have one of those Manila sheets—oiled Manila sheets stapled to them.

Q. Yes.

A. (Resumed.) And I do recall distinctly that these particular documents did have some so attached.

Q. Now, then, you remember by looking at them, seeing that there is no hole punched through them,

19439 that they could not have been handled in the manner that you first described, isn't that so?

A. No, no, that is not so.

Q. Well, do you find any hole in them at all that would indicate that they ever had a brass brad through them like the one you indicated in the first instance (referring to document)?

A. No, it doesn't have such holes.

Q. None of them.

A. But that was not the basis of my testimony. They were attached to the Manila sheet. I have a distinct recollection that they were so attached.

Q. All right.

Now, how were they attached to—what did you call the thing they were supposed to be attached to? Describe that to me again, please.

A. A Manila oiled sheet of paper about the size of an eight by eleven.

Q. Oh.

A. Inches.

Q. And they were attached to that?

A. By wire staples.

Q. By a wire staple?

A. Wire staples—more than one staple.

Q. How many wire staples?

19440 A. Well, I can't recall the number of wire staples, but I know that that was the manner in which they were attached.

Q. What became of that Manila sheet?

A. If my recollection serves me correctly on that, and I believe it does—

Q. Oh.

A. —it was removed at Kansas City, Mo., during January, 1939, at about the time that Mr. Wooden had these particular papers marked for identification.

Q. Why was it removed, if you know?

A. So that it may—I believe, as I recall, and I was sitting at the table at the time—that it may facilitate the marking of those particular exhibits for identification,—that is, facilitate the marking by the Reporter.

Q. Now, you think that these exhibits were not handled in the way that other exhibits were back in the fall of 1937, but that they remained in the condition in which they were up until you got to Kansas City in the spring of 1939, and then you did something to them; is that right?

A. Oh, no, Mr. Zimmerman, they were handled exactly like the other exhibits were in 1937, in the fall.

Q. Well, what was done to them in 1937?

A. They were marked in the manner that I have described, and they were taken from the files.

Q. What files?

19441 A. The official files of the Commission, after they were marked.

Q. How were they in that file?

A. With the field report.

Q. Attached to something else beside this Manila sheet?

A. And the field report.

Q. Oh, they were attached to the field report?

A. Yes, by the brads.

Q. How were they attached to the field report, by the brass brads?

A. Yes, like I explained.

Mr. Zimmerman: Where is the field report, Mr. Wooden?

Mr. Wooden: Whose field report?

By Mr. Zimmerman:

Q. Oh, what field report was it, Mr. MacIntyre, that they were attached to?

A. It was a field report apparently signed by Mr. C. M. Johnston.

Mr. Wooden: Here is Exhibit 3097-3094, I mean (handing document to Mr. Zimmerman).

Mr. Zimmerman: All right.

By Mr. Zimmerman:

Q. Point out to me there, then, where these things were attached to a brass brad such as you have described?

19442 A. The brass brads, Mr. Zimmerman, went through these two holes on the sheet.

Q. Oh.

A. If you hold it up between you and the light, Mr. Zimmerman, you can see how large the holes are.

Q. Oh. Well, we would expect to find holes through the exhibits if they were attached to the field report, would we not?

A. As I have explained, the Manila sheet to which the exhibits were stapled were attached to the field report by the brass brads.

Q. Well, now, what was on the Manila sheet? What appeared on it besides two holes?

A. The staples that went through these exhibits.

Q. Nothing else, no mark of any kind?

A. So far as I recall, there were no marks on there until I had the Manila sheets as well as these exhibits stamped in the same manner that the exhibits are. So that if and when they went back, that is, the same file, they would be able to replace them at exactly the same place from which they had been taken.

Q. Where is the Manila sheet now?

A. I do not recall, but I imagine it is on its way back into the files here, at its proper place.

Q. I see.

19443 Well, I guess you have told us all you know about these documents, have you not, Mr. MacIntyre?

A. I believe I have.

Mr. Zimmerman: Thank you; that is all.

Trial Examiner Norwood: Call your next witness.

(Mr. MacIntyre leaves the witness stand.)

Mr. Zimmerman: Oh, there is one more thing, Mr. MacIntyre, if you please.

(Mr. MacIntyre takes the witness stand again.)

By Mr. Zimmerman:

Q. You do not know who put the brass brad through all of these documents, do you, of your own knowledge?

A. I would have to speak from the procedure of the Trade Commission here to answer that question.

Q. You would not have any recollection with reference to these particular documents about that, would you, as to who put the brass brads through?

A. No, no, I can't answer that question—

Q. I see.

A. —of my own knowledge, because I didn't see it done.

Mr. Zimmerman: I see. All right. Thank you.

Mr. Wooden: Your Honor, we have here now Mr. Royal, who has been recalled for further cross-examination pursuant to the request of Respondent's Counsel,
19444 and following their inspection of the interview reports of Mr. Royal some week or two ago here.

It has just occurred to me that possibly Respondents expected and are entitled to a little longer notice of Mr. Royal's availability here at this time. It comes back to me now that something was said about that at the time.

I have, however, a question or two that I wanted to ask Mr. Royal further on direct, relating to matters we have been going over today, and I can go ahead with them regardless of whether Respondents are ready to proceed with his further cross-examination.

Mr. Leisure: Might as well use up the time.

Trial Examiner Norwood: I had hoped that—

Mr. Wooden: Would you be ready to start this afternoon?

Mr. Leisure: I think not.

Trial Examiner Norwood: I had hoped that cross-examination on that might be confined to those memoranda that you saw fit to let him have before you put him on

now and examine him on something else that opens up this examination.

Mr. Zimmerman: That is right.

Trial Examiner Norwood: I do not know how much time it will take, and unless it is very important I

19445 think that Counsel should—

Mr. Wooden: I will defer it until after the cross-examination.

Mr. Leisure: No.

Mr. Zimmerman: No, no, no reason for that. It will take no longer time now than it would then.

Trial Examiner Norwood: I should like to finish, then, and if it ever appears reasonable or necessary to recall him anew, I will consider it.

Mr. Wooden: I can do it either way, question him now or defer it. That is what it amounts to.

Mr. Zimmerman: Counsel now advises us he does intend to recall Mr. Royal?

Mr. Woden: No.

Mr. Zimmerman: There is no question about that.

Mr. Wooden: I was going to say, if we went ahead now I would question him about this exhibit, Commission's Exhibit 3098-A and B.

Mr. Zimmerman: I think we ought to go ahead and finish, and then have all of our cross-examination at one time.

Trial Examiner Norwood: All right, put him on.

Mr. Wooden: It is very short.

Trial Examiner Norwood: All right, put the witness on.

19446 I. D. ROYAL was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Wooden.

Q. (Indicating document to witness) Mr. Royal, showing you Commission's Exhibits 3098-A and B, for identification, will you state whether or not you received the original of that letter?

A. (Examining document) Undoubtedly I did.

Q. Will you state to what extent, if at all, you super-

vised the work of other men who worked on the Cement investigation in 1933?

A. Well, this came to me, and I think it was—typewritten copies were made of it, so that those who worked on the investigation would have in mind more clearly just what to obtain, and I was instrumental in selecting Mr. Bangert and Mr. Johnston, who, with myself, worked on the Cement investigation at that time.

19447 Q. Did you supervise their work in any way?

A. Well, not exactly. I did split up the territory, to some extent, among us.

Q. Will you state what you did with the copies of this letter, Commission's Exhibit 3098-A and B, when they were made (indicating document to witness)?

A. I presume that Mr. Bangert and Mr. Johnston and myself each had a copy.

19455 Washington, D. C.,
April 13, 1939.

19460 Mr. Leisure: Your Honor pleases, as to Commission's Exhibits 3099-A, B, and C, we have no objection.

19463 Trial Examiner Norwood: You may state your objections to Commission's Exhibits 2604, 5, and 6.

Mr. Leisure: Yes, sir.

We object to those, 2604, and the letters that follow, A to F, and 2605-A to E, and 2606.

On the face of them they purport to be bids, or copies of bids, or tabulations of bids to the highway department by one company.

We object to them as incompetent, irrelevant, and immaterial; no proper basis whatever having been laid for their offer in evidence.

(Mr. Leisure hands documents just referred to to Mr. Zimmerman.)

Mr. Zimmerman: There is a further objection to them on behalf of the Marquette Cement Manufacturing Company.

19464 The documents do not appear to be in any way connected with the Respondent Marquette. The witnesses called in an attempt to identify them had no distinct personal recollection concerning these particular documents. They do not appear to be answers to questions of any sort as referred to in the report letter which was exhibit what—30—

Mr. Wooden: 3094.

Mr. Zimmerman: —3094.

Have you that here?

Mr. Wooden: No, I do not think I have.

Mr. Zimmerman: Well, is that offered in evidence?

Mr. Wooden: No, it is not.

Mr. Zimmerman: The documents should not be received in evidence in any event without 3094 being offered with them, inasmuch as their identity, to some extent, was connected with and dependent upon that.

The documents show upon their face that they were not made and delivered at the time that they were claimed to have been made and received, at least one of them clearly shows it.

There is no showing that they were received either from the State authorities such, for example, 2604, bid, Illinois Highway Department, of April 12, 1933.

19465 The record indicates that inquiries were made of State officials for such documents at about that time. The record also indicates that inquiries were made of other companies—several companies that were bidding on that road project. The documents may, therefore, have been received from any one of those several sources, for all the record shows to the contrary.

19466 2605-A clearly indicates that it was not even in existence on July 12, 1933, from the face of it.

The objections made with reference to 2604 apply also to 2605 and 2606: there has been no proper foundation laid for them and there is no evidentiary value in them. They are not relevant or competent or material.

Mr. Wooden: I shall be very glad and will, in a moment, as soon as I get it, offer 3094.

As to Mr. Zimmerman's statement that on the face of 2605 that it shows that the papers weren't in existence at the time, on the date written on it, I don't know what the basis for the statement is. I would be curious to know.

Mr. Zimmerman: As to this Exhibit 2260, it seems that the Respondent, Marquette, is in no wise connected with the matter at all and, therefore, in no wise interested.

The objection we would make is that so far as Marquette is concerned there is no connection shown.

(COM. EXS. 2260, 3099-A, and 3099-B, was offered and received in evidence.)

19468 Trial Examiner Norwood: As I understand this 2604, 2605, and 2606 are tabulations of bids.

Mr. Zimmerman: They are just what they say on the face.

There is no witness has testified as to any conversation about them.

Mr. Wooden: What they say on the face plus what the witness has testified about their source.

19469 Trial Examiner Norwood: And these were taken from the files of the Marquette Company?

Mr. Wooden: I don't think that is in the record Your Honor, at all. I think the record is Mr. Johnston called on Mr. Wecker of the Marquette Company and requested him to provide a statement showing information of that sort and Mr. Wecker promised to do so.

Mr. Johnston, within a day or two thereafter, or a short time thereafter, left the service of the Commission.

Mr. Bangert then took up the matter and has testified that he procured those papers from Mr. Wecker and has identified them by the marks he placed on them at the time.

Miss Carroll has testified that the writing in the upper right-hand corner was placed on there by her at the time indicated in her writing and pursuant to instructions from Mr. Bangert.

Mr. Zimmerman: And Miss Carroll has also testified that she had no recollection of the case and she told Mr. Bass, who is in charge of one of the divisions for the Federal Trade Commission in Chicago, on a certain date in March that she had no independent recollection of it whatsoever.

Mr. Wooden: Who would?

19470 Trial Examiner Norwood: I recall the testimony. I just wanted to identify these as the papers testified—

Mr. Zimmerman: And, of course, the statement made concerning Mr. Wecker's statement to Mr. Johnston is not Mr. Wecker's testimony. He didn't confirm that at all and Mr. Johnston was unable to identify these documents in any way.

Mr. Wooden: That is true.

Mr. Zimmerman: And it is quite clear that they are not the documents referred to in the letter of report because the letter of report refers to something entirely different: answers to questions.

Trial Examiner Norwood: This appears to be the document received in the office of the Marquette Company. It is very easy for Mr. Wecker to come and tell us if they are not.

Mr. Zimmerman: He has already done that.

Mr. Wooden: No he hasn't.

Trial Examiner Norwood: It came here in the due course of business and I think it is sufficient to justify me in receiving them in evidence for whatever probative value they may have.

The objections are overruled and the exhibits are received as marked; 2604-A to F, 2605-A to E, and 2606.

19471 (COM. EXS. 2604-A, 2604-B, 2604-C, 2604-D, 2604-E, 2604-F, 2605-A, 2605-B, 2605-C, 2605-D, 2605-E, and 2606 were offered and received in evidence.)

19476 (COM. EX. 3094 was offered and received in evidence.)

19477 Mr. Wooden: I have here exhibits that were received on January 20, 1938, page 2538 of the record, as Commission's Exhibits 378-1 to blank, 379-1 to blank, 380-1 to blank, 381-1 to blank, 382-1 to blank, 383-1 to blank, 384-1 to blank.

The Reporter has finished the numbering and identification of those documents so that they now are numbered: Commission's Exhibits 378-A to 378-CC; 379-A to 379-Y; 380-A to 380-W; 381-A to 381-HH; 382-A to 382-Z; 383-A to 383-CC; 384-A to 384-DD.

I am offering these original bids, so numbered, with the request that photostats may be substituted for them, so that the originals may be returned to the files of the Navy

19478 Department from which they were produced by Mr. Custer, I believe, a witness from the Navy Department.

I might say that the tabulation was made of these bids, and the exhibit comprising such tabulation was No. 1099, I believe, but to avoid all question as to accuracy and sufficiency of tabulations, which were made in the hope that we could avoid offering the basic data, I make this offer at this time, although I call Your Honor's attention to the fact that the exhibits, themselves, were received according to the record, but at that time it was the understanding that a tabulation would be sufficient instead of the original papers.

Mr. Leisure: Well—

Trial Examiner Norwood: Did you have the tabulation?

Mr. Wooden: There was a tabulation, as I said, comprising Commission's Exhibit 1099 based on these papers; but there were so many objections and criticisms to its sufficiency and accuracy that I now take this method of meeting those criticisms by offering the original papers.

I am not quite clear, and I do not believe any of my associates is quite clear at this moment, whether or not Commission's Exhibit 1099 was among those stricken from the record, or not; at any rate, these are the original documents.

Trial Examiner Norwood: I think I recall that 19479 it was withdrawn.

Mr. Wooden: I think there was a motion made to strike it, and it was my impression that it was stricken on that motion.

Trial Examiner Norwood: Yes, I think so.

Well, are there any objectioons to the proffer?

Mr. Leisure: Well, I do not—these exhibits are already in the record; I cannot tell Mr. Wooden that he shall not keep offering exhibits that are already in the record; but I certainly do not intend to take up time objecting to exhibits already in the record.

Trial Examiner Norwood: You mean they have been received?

Mr. Leisure: Yes, sir.

Mr. Wooden: I offer now, Your Honor—

Trial Examiner Norwood: You are merely delivering them to the Reporter?

Mr. Wooden: The offer now is in order that it may be understood that photostats may be substitnted for them.

Trial Examiner Norwood: Yes.

Mr. Leisure: Well, that is not an offer, then; that is not an offer.

Trial Examiner Norwood: Any objection to that?

Mr. Leisure: That is not an offer. That is to ask if these exhibits can be substituted for the originals photostats.

19480 Trial Examiner Norwood: That is right.

Mr. Leisure: No use for us going through the long procedure—

Mr. Wooden: No.

Mr. Leisure: —stating our objections all over again if the exhibits are already in the record.

Mr. Wooden: No.

Trial Examiner Norwood: I misunderstood the proposal of the Counsel.

Mr. Leisure: We cannot—

Trial Examiner Norwood: Have Counsel any objection to the photostats being substituted?

Mr. Leisure: We have unless and until we have had an opportunity to compare them with the photostats.

Trial Examiner Norwood: Yes.

Mr. Wooden: The photostats have not yet been made.

Trial Examiner Norwood: Well, I shall request that photostats be made and the originals and the photostats be presented to Counsel for the Respondent.

Mr. Zimmerman: If the Examiner please, may I ask Mr. Wooden if I might interrupt your proceeding for just a moment?

Mr. Wooden: All right.

Mr. Zimmerman: At page 19420 of the record the witness Carroll was interrogated concerning talks that 19481 she had had with one John H. Bass.

I would like to ask Counsel for the Commission as to whether or not the record may show that John H. Bass was on the 17th of March, 1939, an attorney-examiner for the Federal Trade Commission at Chicago.

Mr. Wooden: Oh, yes.

Mr. Zimmerman: And that was the John H. Bass that we had reference to, I suppose?

Mr. Wooden: Yes.

Mr. Zimmerman: Thank you.

Mr. Paulson: Will Counsel answer the question put to him a moment ago, as to what on the face of the exhibit indicates that it was not written July 13—on July 13, 1933?

Mr. Leisure: We have been all over that.

Mr. Zimmerman: You know, I am sorry, but I did not hear you.

Trial Examiner Norwood: Well, read the remark by Mr. Paulson.

Mr. Paulson: Yes, read it.

(Remark made by Mr. Paulson was read by the Reporter.)

Mr. Zimmerman: Oh, I think we have been all over that.

Trial Examiner Norwood: Counsel has already
19482 declined to do that, so—

Mr. Wooden: Your Honor, it seems to me that regarding these exhibits beginning with Commission's Exhibit 378-A, that you should be able to rule at this time whether the photostats may be substituted for these original papers and to determine for yourself whether the photostats are satisfactory.

Trial Examiner Norwood: I think Counsel agrees that may be done after they have had an opportunity to check them.

Mr. Leisure: We want to see the photostats—

Trial Examiner Norwood: Yes.

Mr. Leisure: —before we agree.

Trial Examiner Norwood: Yes. I will assure Counsel that that will be done in view of the attitude of Counsel for the Respondents.

Received with that understanding.

Mr. Wooden: Your Honor, I have here the original bids submitted to the State Highway Commission of North Carolina in 1936 and 1937, which bids were here at one time, and from which a tabulation was made as Commission's Exhibits 11 and 12.

These original bids have been numbered for identification beginning with 3062-A to W—no, 3062-A to Z; 3063-A; 3063-B to GG—

19483 The Reporter: Do you mean 3063-A and then 3063-B to GG?

Mr. Wooden: That is the way it appears here.

3064-A to P, inclusive; 3065-A to Y, inclusive; 3066-A to S, inclusive; 3067-A to AA, inclusive; 3068-A to U, inclusive; 3069-A to GG, inclusive; 3070-A to S, inclusive; 3071-A to BB, inclusive; 3072-A to PP, inclusive; 3073-A to O, inclusive; 3074-A to L, inclusive; 3075-A to T, inclusive; 3076-A to G, inclusive; 3077-A to W, inclusive; 3078-A to V, inclusive; 3079-A to J, inclusive; 3080-A to L, inclusive; 3081-A to V, inclusive; 3082-A to M, inclusive; 3083-A to R, inclusive; 3084-A to KK, inclusive; 3085-A to F, inclusive; 3086-A to E, inclusive; 3087-A to I, inclusive; 3088-A to G, inclusive; 3089-A to F, inclusive; 3090-A to H, inclusive; 3091-A to F, inclusive; 3092-A to U, inclusive.

Commission's Exhibit 3063-A is a signed certification

by W. Z. Betts, purchasing agent of the State of North Carolina, who appeared originally to produce these papers and each sheet contained in each of these original bid papers bears the facsimile stamp signature of Mr. Betts, which is also referred to in his signed certification, namely, Commission's Exhibit 3063-A.

I am offering these original papers, Your Honor, under these circumstances because of the fact of criticisms
19484 being directed against the tabulation which was offered as Commission's Exhibits 11 and 12.

I offer these original papers with the request that photostats may be substituted for them.

Mr. Leisure: If the exhibits are received we shall, of course, have no objection to the substitution of photostats for the originals.

Trial Examiner Norwood: Yes.

Mr. Leisure: In view of the fact that the original data has now been offered this morning, I assume there will not any longer be any objection to our motion to strike Commission's Exhibits 11 and 12 on which these are based; in other words, we do not need both the originals and the—

Trial Examiner Norwood: I think they have been withdrawn.

Mr. MacIntyre: No, that exhibit has not as yet been withdrawn, I do not believe, if Your Honor please, but we would like to know how acceptable the originals are to the Respondents' Counsel before there is any voluntary withdrawal on the part of Commission's Counsel of Exhibit 12, because at that time we did have Witness Betts here who did turn over to Respondents' Counsel the exhibits that have just been referred to, the basic data which has just been referred to by Mr. Wooden.
19485 Now, we want to know whether or not the Respondents' Counsel are willing to accept them as those particular exhibits and in accordance with certification attached to them before there is any voluntary withdrawal of any other exhibit.

Mr. Leisure: We did not—the form of our motion did not take the form of a stipulation. We moved to strike Commission's Exhibits 11 and 12, and that is pending.

As to these papers here, we would like the opportunity

of looking through them and checking them and seeing that they are all here according to our understanding.

Trial Examiner Norwood: May that be done—

Have they been photostated yet?

Mr. Wooden: No,—some of them have, Your Honor; but the job is not quite complete.

Trial Examiner Norwood: What is the pleasure of the Counsel? Can Counsel for the Respondents retain those now?

Mr. Wooden: We can complete the photostating before they take them.

Trial Examiner Norwood: Yes.

Mr. Leisure: I would prefer that that be done that way.

Trial Examiner Norwood: All right.

The proffer will remain as shown on the record 1948[illegible] for further consideration.

19487 Mr. Wooden: Your Honor, further referring to the North Carolina Highway Commission bids of 1936 and 1939, I have here some papers which the Reporter has numbered for identification Commission's Exhibits 3100-A to 3100-EE, inclusive, consisting of a letter from W. Z. Betts, the purchasing agent of the Highway Commission, addressed to me and transmitting said information which Mr. Betts has identified by a stamping of his facsimile signature on each sheet.

I also have papers which the Reporter has marked Commission's Exhibits 3101-A to 3101-Y, inclusive, also consisting of a letter from Mr. Betts to me transmitting certain papers, among them the remainder of the 3101 series.

The 3101 material is photostat material of original papers which I have here and which I can show to Respondents' Counsel if they have any question about the authenticity of the photostats.

I offer these papers in evidence at this time as 19488 supplementary to the bids which I have just offered a few moments ago.

Mr. Leisure: Well, this offer, Your Honor, seems to consist of a series of correspondence between Mr. Wooden and a prospective witness, or a former witness. That totally deprives us of any cross-examination.

I don't see how he can hope to make offers of that kind, at least without checking with us in advance and working out some sort of an arrangement.

I don't think they even require an objection. However, I do object.

Mr. Wooden: It is a matter of certification of papers, it seems to me; that is all that is involved in them.

It is not a question of testimony regarding them. It is simply a question: Are these papers what they purport to be and are they relevant?

Trial Examiner Norwood: I suggest Counsel look over those papers and see if they can agree to let them in.

It will save a great deal of time. It will save us getting that other witness back here.

Mr. Zimmerman: May I suggest that there is a further objection that there is no showing here as to any authority to make a so-called certification.

19489 The matter of the certification of a public record is usually a matter of statutory authority. Certain bodies are granted the right by statute to certify to certain public records but there is no showing here that there is any certification whatsoever.

Trial Examiner Norwood: Well, if the Counsel will look over those and let us know whether or not they are willing to waive any further certification or identification.

19496 Mr. MacIntyre: It is before His Honor, Mr. Zimmerman, to give it consideration. It is a matter of attempting to encumber the record as little as possible.

If Your Honor please, we now offer in evidence the following exhibits which were identified by Witness McClendon, M-c-C-l-e-n-d-o-n, at Kansas City, January 17, 1939, beginning at page 13330 and following.

The exhibits are of the following number: Commission's Exhibits, for identification, 2493, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2507, 2503, 2505, 2595, 2471, 2510, 2514, 2521, 2528, 2536, 2556, 2558, 2559, 2560, 2568, 2585, 2590, and 2594.

19497 Trial Examiner Norwood: You offer those, you say?

Mr. Zimmerman: Let me see the record on that, will you, please, sir?

(A transcript was handed to Mr. Zimmerman.)

Mr. MacIntyre: Yes, they are offered in evidence as tabulations of bids and as identified by Witness McClendon on that date as I indicated.

They are, for practical purposes, of the State Highway Department of the State of Oklahoma, abstracts of bids

received by that department as testified to by Mr. McClendon.

Mr. Leisure: May I ask why they weren't offered at the time the witness was on the stand; why they are held until this time and offered now?

Mr. MacIntyre: I can answer Mr. Leisure on that.

They were offered while the witness was still on the stand in Kansas City, together with many others.

There were something more than a hundred of these and, at the request of Mr. McFadden, Respondents' Counsel, the offer was withdrawn in order that a selection could be made from the total number.

The thought was expressed at that time that probably after a few days of careful selection the number could be reduced, and that was a thing that we couldn't do on that date.

19499 Mr. MacFadden: At the moment I don't recall the suggestion Mr. MacIntyre says I made at Kansas City, but I presume he has checked the record and found that that is substantially what was said.

Of course, my point, perhaps unspoken at that time, was that even after a selection had been made, all of the bids should be available so that we might check the selection that had been made as well as the materiality and completeness of the tabulation from the original bids and also that whenever any offer of the kind was made it should be done at a time when the witness was on the stand so that we would have the right of cross-examination.

Consequently, we now ask that we have an opportunity to inspect not only the basic data of these particular tabulations that are offered, but all of the other bids and the tabulations so that we may check the kind of selection that has been made.

19500 Mr. Paulson: If I am not mistaken, Your Honor, Respondents have already admitted the facts as shown by these exhibits. Their answers admit the substantial accuracy or the accuracy of the Oklahoma bidding situation.

19501 Mr. Zimmerman: I would be surprised if my client has admitted anything. I am quite certain not while I have been conscious have there been any admissions made.

Trial Examiner Norwood: Well, was the supporting data tendered on that?

Mr. MacIntyre: We have the supporting data of these particular tabulations and if Counsel for Respondents would care for it, we would be happy, of course, to permit them to look over the supporting data.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: As well as the tabulation.

19503 Mr. Withrow: Do you have the supporting material there, Mr. MacIntyre?

19504 Mr. MacIntyre: We do, and I would like to say, in that connection, that I will turn over to Respondents' Counsel at this time, before we come to the supporting data, documents which have been heretofore marked for identification as Commission's Exhibits 2472, 2473.

Mr. Withrow: Your Honor please, off the record.

19505 Mr. MacIntyre: Your Honor please, we also offer at this time documents which were marked for identification and identified at the time witness Bickler was on the stand, March 31, 1939, the documents—

Mr. Zimmerman: What is the page of the record, please?

Mr. MacIntyre: It begins on page 18674.

Mr. Zimmerman: Yes.

Mr. MacIntyre: The documents now offered are those heretofore marked for identification as Commission's Exhibits 2949-A to H; 2950-A to N; 2951-A to QQ; 2952-A to BB; 2953-A to U; 2954-A to K; 2955-A to T; 2956-A to U; 2957-A to M; 2958-A to W; 2959-A to L; 2960-A and B; 2961-A to L; 2962-A to GG; 2963-A to H; 2964-A to J, all inclusive.

Those documents are offered as containing statements in the form of admissions on the part of Respondents, parties to this proceeding.

Mr. Zimmerman: Well, now—

Mr. MacIntyre: Or representatives of Respondents, parties to this proceeding.

Mr. Zimmerman: Where in the record do you maintain that there was any foundation laid for the identifi-

19506 cation of these documents?

Mr. MacIntyre: They were identified throughout the progress of the examination by witness Bickler on the date and at the pages that I specified.

Mr. Zimmerman: Well, then, of course, we manifestly will have to refresh our recollection from the record before stating any objections.

Mr. MacIntyre: And, if Your Honor please, if there is

any further and meticulous identification necessary to satisfy Counsel as to these particular documents, we would like to state that we will make the offer on the condition that they be excluded from the record before the record is finally closed in this case, if the Commission has not, as on that date, submitted to you a certification from the Clerk of the Court in the State of Texas that this is a true and correct copy of excerpts from that certified record in that particular court.

Mr. Zimmerman: I do not think that that would make them admissible; I would not stipulate to that.

Mr. Leisure: We may have time to look these over, I take it, Your Honor?

Trial Examiner Norwood: If Counsel thinks that that would be a sufficient identification.

(Mr. Zimmerman and Mr. MacIntyre consult together at Counsel table with the official record in their
19507 hands and out of hearing of Reporter.)

Mr. Paulson: May we have the question read, Your Honor—that is, for Mr. Zimmerman?

(Mr. Zimmerman and Mr. MacIntyre still confer out of hearing.)

Mr. Wooden: Is there something you want on the record now?

Mr. Zimmerman: No.

I. D. Royal recalled for cross-examination.

Mr. Leisure: Shall I start, Your Honor?

Trial Examiner Norwood: Yes.

I. D. ROYAL was thereupon recalled as a witness for the Commission, and, having been previously
19508 sworn, testified further as follows:

Cross-Examination by Mr. Leisure.

Q. Mr. Royal, when you testified on direct, I think you testified concerning certain interviews in 1931 and 1933 and 1936; do you recall?

A. '31 was the beginning in some sections of the country; '32 in others.

Q. That is right. And '33, and down to 1936?

A. Yes, sir.

Q. Have you got those reports there that you used at that time?

(Mr. Wooden hands documents to witness.)

Q. Are those the ones that you have there?

Mr. Leisure: Are those the ones that we have had, Mr. Wooden?

Mr. Wooden: Yes.

By Mr. Leisure:

Q. May I just see them, Mr. Royal?

(Witness hands documents to Mr. Leisure.)

Mr. Wooden: They all bear numbers for identification.

Mr. Leisure: There are no others—off the record. There are no others here that you do not want us to have? These are the ones we saw?

19509 Mr. Wooden: These are all that are Mr. Royal's reports.

Mr. Leisure: These are the ones that we saw the other day?

Mr. Wooden: Yes, that is right; I have separated the Bass reports, that is all.

(Mr. Leisure examines reports.)

By Mr. Leisure:

Q. I think you said, Mr. Royal, on your direct, that you interviewed at the Hawkeye Company both Mr. Condon and Mr. Kosdorf of that company; is that correct?

A. Yes.

Q. And your interview at that time covered the sale of cement in the territory where the Hawkeye Company did business?

A. Yes.

Q. And that interview covered such subjects as the methods and policies of the company, and price increases, and general competitive factors which influenced the company policy,—is that correct?

A. Those were among the subjects.

Q. Yes.

I think you said you talked to Mr. Condon part of the time, and you talked to Mr. Kosdorf part of the time; is that so?

A. I believe that is so; yes, sir.

19510 Q. Now, with respect to your interview with Mr. Condon in 1931, did you have any conversation with him as to whether or not there had been considerable price cutting in his territory?

A. Well, I am afraid I would have to ask for the—

Q. The report?

A. —the transcript or notes of my report to be supplied to me.

Q. Is this the report that you have in mind (handing document to witness)?

A. That's the one covering the interview in 1931.

Mr. Wooden: What is the exhibit number?

The Witness: 2934-A to E.

A. There is reference in this interview to some price cutting.

By Mr. Leisure:

Q. That is, do you mean by that, Mr. Royal, that Mr. Condon told you there had been considerable price cutting in his territory?

A. I have in here that he stated that about two weeks previous to the date of the interview, in a bid to the 19511 Missouri State Highway Commission, the mill at Sugar Creek, that is in Kansas, made cuts in price of 25 cents per barrel, making mill net for Sugar Creek of 75 cents per barrel.

Q. Well, aside from that specific notation, do you find anywhere else in the report, or do you recall independently, having refreshed your recollection from the report now, whether or not he told you there was considerable price cutting, or was not considerable price cutting, in his territory?

Do you have any recollection on the subject at all?

A. I have no independent recollection of it, and I don't see that—I haven't seen, so far as I have read in this, that that subject was gone into any further, or much further than I have read.

Q. Now, do you notice there now where you say that he said that the Hawkeye Company met these price cuts by combining sales of rock with sales of cement—

Do you find that?

(Witness continues to study report.)

Mr. Leisure: Help him (addressing Mr. Withrow).

(Mr. Withrow comes to the witness stand and looks over report with witness.)

A. Yes, I do find a reference to that.

Q. Yes. Now—

A. In these words—do you wish me to read it?

Q. I would rather have your recollection on it,
19512 if you remember. Do you remember what he told you about having met those—

A. I wouldn't undertake at this time to quote his words on that point—

Q. All right.

A. —without refreshing my memory.

Q. All right.

At that time did Mr. Condon tell you that there was no uniformity among manufacturers with respect to commissions paid to dealers?

A. He said there was no uniformity in dealers' commissions, though there was considerable uniformity under a previous plan where dealers' discount was allowed from the face of the invoice in addition to the 10-cent cash discount (witness reading from exhibit).

Q. Now, did he tell you anything about whether or not the dealers were able to underbid Northwestern States, and some other companies, in this Iowa State Highway letting of December 5, 1929, because of cut prices made to dealers by certain manufacturers?

A. (Witness consults exhibit.) He replied to the questions—

Q. Sir?

A. In reply to questions he stated that—

Q. Well, just read the question again, Mr. Royal. I would rather you would not read something else.
19513 Would you mind just reading the question?

A. All right.

Q. And tell me whether or not he told you anything of that sort after you have refreshed your recollection from the exhibit.

The Witness: Will you please read the question.

(Last question read by Reporter.)

By Mr. Leisure:

Q. Now, you can refresh your recollection from your notes and answer me whether he did or not,—can't you, "yes" or "no"?

A. He did.

Q. Yes.

Do you recall, independently, what questions you asked him with respect to that, Mr. Royal?

A. Well, not independently of this report of the interview (referring to exhibit).

Q. Now, there are no questions in that interview. That is in narrative form, is it not?

A. Except my reference to the question in these words, he was asked what he knew about the Fullerton Lumber Company.

Q. Yes.

A. Underbidding the Northwestern States Portland Cement Company.

Q. I see.

19514 A. And so forth.

Q. Now, during your interview with Mr. Condon in 1933, did you learn anything about whether or not the Hawkeye Company set a minimum mill net of 97 cents on its 1933 bids for the Illinois State Highway business?

A. I learned that they did set a minimum net figure. I have forgotten what that figure was, and wouldn't know without refreshing my memory by the report of the interview.

Q. Yes.

Well, perhaps we can tell you with that.

Will you look at Commission's Exhibit 2933-A to I, and look in the second paragraph along towards the bottom (indicating the exhibit).

And when you have refreshed your recollection, if you do not remember the question, will you have it read.

A. (Witness examines exhibit) Well, Mr. Condon told me that in the year 1933 in the bids they made to the State of Illinois they undertook to give themselves a mill net of 97 cents per barrel as a minimum.

Q. Yes. And did you discuss with Mr. Condon current market prices in 1932 with reference to the bids?

A. (Witness makes no response.)

Q. Did he tell you, to be more specific, that the Hawkeye did not bid in 1932 because the mill nets which it received would be too low?

19515 A. He told me that; yes, sir.

Q. Yes.

You would not have that recollection now without referring to the notes, as you state?

A. Not at this time.

Q. No.

Now, did Mr. Condon also tell you that his company lost over $500,000 in 1932?

19526 Q. Will you refresh your recollection from your notes, there, of 1932? I am referring, now, to Ex-

hibit 2933-A to 2933-I, if your memory needs refreshing, and tell us whether or not it is not a fact that in that selfsame conversation that Mr. Condon told you that his company lost over $500,000 in 1932? Do you recall that?

A. If your assistant will let me see that, to re-
19527 fresh my memory.

A. He stated in 1931 and 1932 they showed a loss of $521,000.

Q. And didn't he tell you they lost $500,000 in 1932, though?

A. The way this reads it shows they lost that for the two years; that in 1931 and 1932 they showed a loss of $520,000.

Q. Now do you recall, Mr. Royal, whether you discussed with Mr. Condon in that conversation a price
19528 change which occurred in 1932?

A. Yes; I think I recall that I did.

Q. And did he or did he not tell you that that price advance started in June of that year; namely, 1932.

A. I am going to ask to see that report again.

Q. We can't both use it at the same time, that is the trouble.

(Mr. McFadden hands documents to the witness.)

A. Thank you.

The Witness: Will you read the question again, please?

(Question read.)

A. Not according to my recollection, but according to the report that I had transcribed shortly after the interview he said that he could not tell for certain what company started the advance in price—

Q. Mr. Royal, let us save some time: Did he or did he not tell you that it started in June?

A. I am going to say "he thinks the advance started in June, 1932."

Q. Then he did tell you he thought it started in June of that year?

A. That he thought it started in June, yes.

19532 Q. Did you, during that conversation, Mr. Royal, have any conversation with Mr. Condon respecting the fact that when there had been one price increase that some of the companies had gone back to the old price because the price increase had not been followed. Do you remember anything of that kind of subject matter being discussed between you and Mr. Condon?

A. I have no recollection of that in mind right now. I would have to refresh my memory.

Q. Let me show you your report on that, please.

(Counsel hands witness documents.)

Q. Is that Exhibit 2933-A to 2933-I that you have in your hand, now, Mr. Royal?

A. That is the number of it.

19540 "Q. Now, then, you have your report in front of you, Mr. Royal. Will you just tell us whether you find anything there with respect to a price increase which certain companies did not follow, and I would like to ask what it is."

A. (Witness studying report) I find something in the report in regard to the attempted raise in price by one company.

Is that the instance that you have reference to?

By Mr. Leisure:

Q. That is, perhaps, one of them, and did he tell you whether or not that raise was effective and that the companies did not follow it?

A. He told me that.

Q. He told you that they did not follow that raise?

A. He told me that one certain company, which I can give the name if it is desired, attempted to raise the price 10 cents a barrel in March of 1933, after they had first issued an announcement of a raise in wages, but this advance was apparently not considered by the other companies, as no other company followed it.

19541 Q. Did he tell you, with respect to this 1932 price raise, where you gave the figures to Mr. Wooden on your direct examination—

Mr. Wooden: What page?

Q. (Resumed) —with respect to the 1932 price raise, did he tell you that his company followed that price

19542 increase because the prices had been so low prior to that that his company had lost considerable money? Did he tell you that, or anything similar to that?

19543 A. Mr. Condon stated that the price raise in the summer of 1932 came after a period of such low prices, then it was followed either by all of the other companies.

He did not mention his own company specifically.

By Mr. Leisure:

Q. Well, you understood, when you spoke to him, that his own company did follow that price?

A. I understood it was included in all.

Q. Precisely, and you understood when he gave
19544 you the reason for his company having followed that price, that he was speaking of the reason that you have just stated?

19545 A. Well, that is about the only answer I can make to your question, Mr. Leisure. The price rise in the summer of 1932, he stated that after a period of such low prices that it was followed eagerly by all of the other companies.

Q. And you understood his company, also, as being one of those companies?

A. I understood that—

Q. You understood that at the time, did you not, Mr. Royal?

A. I did.

19546 Q. And when you were discussing that price rise of 1932, you were questioning him about it, he told you, did he not, that there had been no understanding among any cement manufacturers relative to prices or policies?

19547 Q. In that same report which you are just looking at, now, haven't you got that in your report, 2933-A to I?

A. He told me he knew of none.

19608 Washington, D. C.,
April 14, 1939.

19611 I. D. ROYAL thereupon resumed the stand and testified further as follows:

Cross Examination (Continued)

Trial Examiner Norwood: Proceed.

By Mr. Leisure:

Q. Mr. Royal, at page 12799 of the record, on
19612 your direct examination, you stated that you asked Mr. Condon in 1933 about the Hawkeye bids to Illinois, and I think you stated further that you asked him if Hawkeye bid the current market prices.

I would like to ask you in connection with that if, as a part of that same conversation, and with respect to that, Mr. Condon did or did not tell you that Hawkeye learned of these current market prices from quotations of competitors which Hawkeye salesmen had picked up from dealers and sent in to the Hawkeye office?

19613 A. I think I have to have my recollection aided by glancing—

By Mr. Leisure:

Q. By having your report?

A. My report, yes.

(Mr. Leisure hands document to witness.)

A. (Witness studies report.)

19614 Q. Do you find the place, Mr. Royal, where you said you came across in the Hawkeye files competitors' price quotations?

A. (Witness continues to examine document.)

19615 Q. Look also on page 1, as well as that one—on page 1 of the Commission's Exhibit 2932, for identification, toward the bottom of the page, Mr. Royal.

A. (Witness continues to search data.)

Q. Do you not see it there, Mr. Royal, without reading the whole report?

A. On this first one, if you will point it out to me, I can—if you have seen anything of that kind in this report, and will point it out to me, I will be glad to read it over.

Q. All right. I thought perhaps you knew where it was.

Will you look at the first page on the next one, and see if you do not see it toward the bottom of the page.

A. Something in regard to examining some files?

Q. Yes.

A. Is that what you have reference to?

Q. Yes, that was my next question, whether or not you did not find—whether or not you do not find in that report that you came across competitors' price quotations in the Hawkeye files.

A. (Referring to documents) There is a reference there, to making an examination of price instructions and relative to price information received from salesmen.

Q. That is right. Now, as to how the Hawkeye Com-

pany obtained these market prices which you discussed with Mr. Wooden, did he or did he not explain to
19616 you that he sent this out to all of his salesmen: "If you hear of any quotations being out in the hands of the trade affecting territories based on other base prices, advise this office promptly."

Q. Do you find, there, Mr. Royal, where you said you came across a circular letter?

A. Circular letter, yes.

Q. And it contained the exact statement which I quoted, did it not, and you so reported it to the Federal Trade Commission? Is there any question about that?

A. It contained this statement basing—

Q. Never mind whether it contained this statement. Did it contain this one—please let us save as much time as we can—"If you hear of any quotations being out in the hands of the trade affecting territories based on other base prices, advise this office promptly."

19617 Did it say that?

A. The circular letter that I examined did say that.

Q. Very good. At last we have got that.

Now, that statement was contained in a form letter to all salesmen, was it not?

A. It was addressed to salesmen.

Q. Yes.

A. I can't say whether it went to all of them.

Q. All right.

Now on the record at page 12814, Mr. Royal, you were asked this question by Mr. Wooden: "What did you say and what did he say"—I will start with the question above that.

"Did you have any conversation with Mr. Condon on that occasion with regard to the cost of selling State highway business?"

You answered: "I did."

Then Mr. Wooden asked you: "What did you say and what did he say?".

You replied, "Mr. Condon said it was an advantage to sell to the State," and so forth. Do you recall that testimony, Mr. Royal?

A. I recall something along that line.

Q. Yes.

Now, with respect to that same conversation—
19618 and will you look at your report if you need to refresh your recollection—concerning the change in policy by the Iowa State Highway Commission in having cement furnished for highway construction by contractors who purchase through dealers instead of having purchases made directly by the Highway Commission from manufacturers, which you discussed, as I have outlined, with Mr. Wooden, did Mr. Condon also tell you that the change in policy was not due to any influence from the cement companies but was brought about by the desire of the State authorities that dealers, particularly in small towns, might derive some benefit from the State projects near their own towns?

19620 Q. Can you answer that either with or without your notes, Mr. Royal?

A. (Witness studies data): Referring to the report, I have noted in it that Mr. Condon did make a statement that the change in policy of the State of Iowa in buying cement for highway purposes, the policy of the contractors buying cement, and including material costs in their bids, was not due to any pressure or influence exerted by the cement companies, but was possibly brought about by the desire of the State authorities that dealers, particularly in the small towns, derive some commission or profit from the sale of cement for projects in the vicinity of their towns.

19621 Q. All right.

At page 12811, Mr. Wooden asked you on your direct examination if you had any conversation with Mr. Condon about f.o.b. mill prices, and you said you had some discussion on that point, and, with respect to that subject, did Mr. Condon also tell you that if his mill sold on a flat f.o.b. mill price its sales territory would be restricted to only the area where it had a freight advantage over competitors, and that such a restriction would cause a substantial reduction in Hawkeye total sales?

A. (Witness refers to document.)

Q. Aside from the report, the second report which you have there, Mr. Royal, will you, if you need to refresh your recollection, look at the second page of Commission's Exhibit 2933-A to I, this being the report of your 1936 interview with Mr. Condon (handing document to witness).

19622 Q. Do you see it there?

A. (Referring to data) Mr. Condon did make such a statement.

Q. He did?

A. In effect.

Q. Thank you.

Now, at page 12393, Mr. Wooden asked you if you had any conversation with Mr. Tyler as to any concerns known as price cutters, and you discussed that subject with Mr. Wooden on your direct.

Mr. Royal, did Mr. Tyler tell you, in connection with that same conversation, that sales were constantly made by companies at prices less than those which they publicly quoted?

Do you have any independent recollection on that point, Mr. Royal?

A. I do not at this time.

Q. Then, will you be good enough to refresh your recollection from reports, Commission's Exhibit 2927,

19623 made to the Federal Trade Commission (handing document to the witness).

19624 Q. Can you say whether or not, Mr. Royal, that Mr. Tyler made, in substance, such a statement to you at that time?

A. Substantially, he did, yes, sir.

Q. And as to that, will you keep the same place there in case you do need to refresh your recollection again. As to that, did he not inform you that the manufacturers were at the mercy of the building supply dealers?

19626 Q. Do you recall he said that, in substance, Mr. Royal?

A. Substantially, he did; yes, sir.

Q. And on the same subject of price-cutters, did not Mr. Tyler also inform you that, in the same interview, while quotations, that is, all companies at any destination may be practically uniform, there is plenty of price cutting when it comes to actually making a sale?

Q. Was that a part of your conversation, Mr. Royal?

A. I am trying to refresh my memory by looking at this report and I haven't located that particular thing, yet.

19627 Q. Don't you find it there, Mr. Royal? Don't you find anything, at least, that sufficiently re-

freshes your recollection to know whether or not that statement, in substance, was made to you?

A. I find a reference to Mr. Tyler giving me the information that "While quotations at any and all destinations might be practically uniform, there was price cutting when it came to actually making the sale."

19632 *Redirect Examination by Mr. MacIntyre.*

19635 Q. Mr. Royal, I am handing you all documents which have been marked for identification as Commission's Exhibits 2927 to 2948, inclusive, as handed back to me by Counsel for Respondents since their close of your cross-examination.

I would like to ask you to make an examination of those as to the dates of the reports, the names of the persons whom you interviewed, as rapidly as you can, and satisfy yourself from them whether or not they do include interview—that is, all of your reports of interviews of
19636 the persons whose names appear at the head of any of those reports as having been interviewed by you?

A. (Witness studies exhibits handed to him by Mr. MacIntyre.)

Trial Examiner Norwood: We will take a five-minute recess and let the witness check those over.

(There was a short recess taken.)

19637 By Mr. MacIntyre:

Q. Mr. Royal, have you completed your examination of the exhibits that I handed you before the recess?

A. I have.

Mr. MacIntyre: Will you please read the question I asked him previously, there?

(Question read.)

Mr. MacIntyre: "By you" should be on the end of that question.

A. According to my best recollection, they are.

By Mr. MacIntyre:

Q. Do you know of the existence of any report of an interview that you had with any of those gentlemen which you submitted to the Commission and not included in that group of exhibits?

A. No. They seem to be all here and are all here, so far as I can tell.

Q. Have you known or do you know now, of the existence of any other reports which you did or did not submit to the Commission as of the date of your testimany in Chicago or since not included in that group of exhibits you are now holding? That is, relating to interviews with the persons that those interview reports relate to?

A. There are no others; have been no others.

Q. That is, since the time you testified in Chicago?

A. That is true.

19638 Q. At the time you were testifying in Chicago did you know of the existence of any other reports that were available to Mr. Wooden or to you than those that you now hold in your hands?

A. With these informants, no, sir.

Q. Do you recall ever having submitted to the Federal Trade Commission interview reports on any of those persons not included in that group of exhibits you now hold in your hand and which I have referred to?

A. No, I never did.

19640 Q. (Showing paper to witness) I hand you Commission's Exhibit, for identification, 2934. It may be that the reference that Mr. Leisure had was to that report, by Mr. Condon.

A. (Witness studies document.)

Mr. Zimmerman: I think that the record ought to show that the witness is studying the memoranda, so that it will be clear that his answer is not based upon his recollection, but, rather, upon the study of the memoranda.

Mr. MacIntyre: I specified that if he had no independent recollection without referring to his report?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —that I have just handed to him, and to which I have referred, that I would like for him to attempt to refresh his recollection from those.

Mr. Zimmerman: Quite; but I did want the record to show that that is what he was doing.

Trial Examiner Norwood: The record does show that.

A. (Witness referring to date) Mr. Condon, according to the report that I made soon after the interview with him, did refer to one specific company as being quite a price cutter.

By Mr. MacIntyre:

Q. Well, what company was that?

A. That was the Marquette Cement Company.

19643 *Recross-examination by Mr. Leisure.*

Q. Mr. Royal, in regard to this price cutting of Marquette which you just told Mr. MacIntyre about, didn't he also tell you other companies were able to underbid Marquette on this December 5, 1929, because of cut
19644 prices made to dealers?

If you have any doubt about that, will you look at your report; Exhibit 2934-A to E?

A. The price-cutting that I just referred to was not embodied in that report; it was 1932 price cutting.

Q. I am talking about whether or not he didn't tell you, and I name Marquette specifically, that other companies were able to underbid them on the letting of December 5 in Iowa because of cut prices made to dealers?

A. Letting of December 5, when?

Q. If you don't remember that he did tell you that, will you look at your report, Commission's Exhibit 2934-A to E, for identification?

19645 A. Yes, I find some reference to that.

19647 *Recross-Examination by Mr. Zimmerman.*

19655 Q. The paragraph referred to begins, as follows; 2933-D:

"Mr. Condon was questioned as to what his company would have done in a situation similar to that of the Lone Star (Kansas) in the Iowa bidding of August 16, 1932, where the Lone Star bid 4 cents lower than the others at Fort Dodge, which was one of the 10 delivery points through what is claimed to have been a typographical error in writing the bids, and rather than stand on this 4-cent lower bid at the one point, requested the withdrawal of their entire bid at the 10 points. Mr. Condon replied that in such a case he thinks he would have let the bid stand, but he says, though he has no means of knowing the reasons for the Lone Star's action, the 4-cent cut at Fort Dodge might have torn down the Mason City base. At any rate it might have caused the other companies to meet the lower Fort Dodge price in commercial business, but this could not have hurt the Lone Star because that company does little commercial business in Iowa, at least does not ship as far north as Fort Dodge. But follow-

ing this up Mr. Condon was questioned as to why his company would not cut under the prevailing commercial prices in their Illinois Highway Department bid of February
20, 1933, when practically all of Illinois, as he stated,
19656 was out of their regular commercial territory. Mr.
Condon answered this by stating that they made slightly lower bids—"

Now, on page—Commission's ~~Exhibit 2933-E~~, continuing:

"—than he had reason to believe the other companies would make because of the existing commercial prices, the general price structure would have gone down and he admitted frankly that what prevents a company from making cuts of this nature in such a case is the fear of retaliation by competitors. He was reminded of the price-cutting indulged in by the Marquette Company in connection with the State Highway Illinois bids of 1932, and was asked why the fear of retaliation when the Marquette Company had apparently not been harmed by this price-cutting, but had gotten the business. He replied that the Marquette Company had gotten the business but at prices that caused them heavy losses and furthermore they 'oversold' themselves; in other words, they sold more cement at what informant claims were ruinous prices than they had capacity to ship and had to call on other manufacturers to fill some of their commercial orders for them. Mr. Condon says the Hawkeye Company shipped about
1,000 barrels on the Marquette's order to Waterloo,
19657 and he knows his company filled other orders for the
Marquette Company and that various other manufacturers did the same. This assistance in filling orders may possibly have been the basis for the rumor that the Commission's—"

A. You put a "that" in there.

Q. Yes; "that" should not be in there.

I will repeat.

"This assistance in filling orders may possibly have been the basis for the rumor the Commission's attorneys learned of in Springfield, to the effect that the Marquette Company received assistance from a group of competitors in 1932, although this assistance was presumed to have been financial assistance."

That is the end of the paragraph, isn't it?

A. Yes.

Mr. Paulson: I object to that question.

Mr. Zimmerman: That is all; thank you.

I read it correctly with the exception of the word "that" which I did interpolate?

The Witness: Absolutely.

19658 That is the whole of the paragraph and part of which you quoted when you answered the question to Mr. McIntyre, isn't it?

The Witness: Yes.

Redirect Examination by Mr. MacIntyre.

Q. That paragraph Mr. Zimmerman has just read to you and in which you have, in turn, answered his question; is based upon—contains statements made to you by Mr. Condon, does it?

A. Yes.

19660 Mr. MacIntyre: That is all.

Mr. Zimmerman: Thank you very much, Mr. Royal. That is all.

Mr. Wooden: I would like to have the record show, Your Honor, that Mr. Royal was brought here from Minneapolis, Minnesota.

19671 Mr. Wooden: Your Honor, referring back to page 70 of the transcript you will find there an offer was made of Exhibit 4-A and 4-B on the identification of Mr. Tackett under whose supervision the material was compiled.

The record does not show any ruling, definitely, upon those papers and the same is true as regard 5-A and 5-B referred to on pages 71 and 72.

It also develops that 5-C, 5-D, 5-E and 5-F were a part of the same compilation as 5-B and these were all marked by the Reporter at the same time but the record does not show any reference to 5-C, 5-D, 5-E and 5-F.

I would just like to know whether it is going to be necessary to recall Mr. Tackett for the purpose of completing the record as to 5-C to 5-F, inclusive.

Trial Examiner Norwood: He is here in the building, isn't he?

Mr. Wooden: Yes.

Trial Examiner Norwood: I suppose objections have already been stated on those and I can get them from the record if any.

19672 Mr. Wooden: I don't think there were any.

(Addressing the Reporter) Will you mark these papers for identification?

(Whereupon the certain documents referred to were marked for identification as Commission's Exhibits Nos. 3103-A, 3103-B, 3104-A, 3104-B, 3105-A, 3105-B, 3106, 3107 and 3108.)

19673 Mr. Leisure: Your Honor pleases, as to this exhibit—

Trial Examiner Norwood: That is 4-A and B?

Mr. Leisure: 5-A, 5-B, 5-C, D, E, and F.

Trial Examiner Norwood: Yes.

Mr. Leisure: I observe on the record at page 73 we were allowed the deferred right of cross on the exhibit. Now, since it was never received, we have never inspected it, and, frankly, I do not know, at the moment, just what it is about.

I would like to have some time to look at it and see what it is about, see if we want any further cross on it; we may not, but it is a long exhibit, and I cannot do that in a few moments.

Mr. Wooden: The exhibit is nothing but a tabulation from one of the published reports of the Commission which was based, in turn, upon reports received from the companies, and, in addition to that, there is nothing but a key list of the companies identified by number, the companies shown in the printed tabulation.

Mr. Leisure: Well, I wouldn't want to waive anything on it until I have had a chance to look at it. It is a tabulation, as I see it, coming from the White book from which they have selected certain things that Counsel thinks he wants in the record.

19674 Now, I cannot go further than that. I just do not know what it is.

Trial Examiner Norwood: What about 4-A and B?

Mr. Leisure: Oh, what are they?

(Counsel inspects papers.)

Mr. Leisure: Well, the same applies as to that, Your Honor. I would have to find out more about it. I notice on page 69 that the witness who purports to identify it simply says if appears to be a report made to the Senate. I do not know what it is. It has never been received in evidence, and I would not want to waive anything on it until I have had a chance to examine it and find out.

It is a tabulation of something.

Trial Examiner Norwood: This public document known as the White Book, isn't that something of which the Commission may take judicial notice, and any tabulation based on, it may be put in the brief without its going in evidence?

19676 Mr. Leisure: We have the right of cross-examination if, when, and as it is offered.

I would like a chance to look at the exhibit and determine whether or not we want to make any objection.

Trial Examiner Norwood: Didn't you have a copy of that?

Mr. Leisure: No.

Mr. Wooden: The tabulation, that was pub-
19677 lished—5A is published.

Mr. Leisure: We have never gotten copies, so far.

Mr. Wooden: I mean, it was a public document.

Mr. Leisure: We have copies of the white book, yes.

Trial Examiner Norwood: Do you want to recall this witness and let him cross-examine him on it?

Mr. Wooden: Yes. We can go ahead with something else in the meanwhile.

19680 Mr. Zimmerman: Yes, I want to get this clear. Suppose we should make an objection to some one of the exhibits, and it would be, in the opinion of Commission's Counsel, necessary on account of that objection, perhaps, to recall a witness. I think he should be privileged to do that. In other words, I think merely because he is making these offers now and we are being allowed whatever time Your Honor thinks is proper to file our objections in writing, that should not foreclose Counsel from calling a witness to further identify these exhibits, if it is made necessary by some objection.

Mr. Wooden: That is the one thing, Your Honor, that seems to me should be unnecessary, to call witnesses for the purpose of identifying the documents that are to be offered.

Trial Examiner Norwood: Well—

Mr. Zimmerman: I am not wishing that on them; I am merely suggesting that to be cooperative.

19681 Trial Examiner Norwood: Probably if you give Counsel for the Respondents time to look over them it will not be necessary to call these witnesses.

Mr. Zimmerman: I was only saying that I thought it was proper that they have that right.

Excuse me. I should not have made the suggestion.

Mr. Wooden: We would not know until they checked the exhibits if that would be necessary, and the case would drag along for several weeks on that basis.

19685 Trial Examiner Norwood: As I understand it, Counsel has proposed to report on them Tuesday morning.

Mr. Leisure: No, I was suggesting that we have a week to go through all of these exhibits.

Mr. Paulson: Yes.

Mr. Leisure: And that we need a week from Tuesday, and then state whatever objections we have at that time, and have the work done.

Trial Examiner Norwood: I think if we will get this proceeding to the point of where Counsel for the Commission says that he rests his case subject to the disposal of these exhibits, either by having them received by agreement or furnishing data through witnesses, I think that he may close his case conditionally, then we shall appoint a day for the Respondents to begin to put in their testimony, and he may have a week in the interim, and we will call a hearing to receive and dispose of the exhibits one way or another. I think that is practical. I think it ought to be satisfactory to all parties.

Mr. Leisure: I did not understand—

Mr. Wooden: As I understand, I thought it would be—

Trial Examiner Norwood: Yes.

Mr. Wooden: That is, I understood it to the effect that a time period would be allotted, subject to our closing or resting the case, and our closing is subject to

19686 action upon these pending exhibits.

Mr. Leisure. No.

Trial Examiner Norwood: No, you may rest your case with that reservation; you may dispose of these exhibits here.

Mr. Zimmerman: Well, I think we ought to get all of the exhibits offered before we even discuss the matter any whatever.

Mr. Leisure: Yes.

Mr. Wooden: I think this illustrates that delay is the prime purpose.

Mr. Leisure: Oh, yes.

Mr. Zimmerman: That is the most ridiculous and unfair statement I have heard in a long time.

Mr. Leisure: Let me point out—I do not say this was done by design and deliberately, but it is the way it works out, that after the Government finishes its case we are entitled to a little time to start thinking about our case, but now the way it is working out they are piling enough exhibits on us so that the entire period between the time they close their case and we are supposed to start ours, we will spend checking their exhibits.

I do not think it is fair procedure whether by design or accident, and I object to it.

19687 Mr. Paulson: We will never get anywhere, Your Honor, please, until we get down to one particular exhibit. We cannot generalize.

Trial Examiner Norwood: Counsel has already suggested that, and I have considered that, and that is exactly what we are doing.

Mr. Wooden: Since the subject came up, I want to add this, before it passes any further, that in resting our case I propose that it shall be rested also, subject to this,—that throughout the course of the hearings there have been calls made from time to time for the production of various documents many of which, and most of which have not yet been produced, and I would rest the case subject to the production of those documents as called for, or have some pretty clear and definite report to the effect that they cannot be produced.

Trial Examiner Norwood: Yes.

19688 Mr. Leisure: I don't know of any such procedure and I want to object to any such procedure subject to what Counsel may want to do after his case is closed. I don't subscribe to any such doctrine as that.

There are certain exhibits we presented here on subpoena last week. I have reference to the Dewey material; and nothing has been said about those since that time.

Mr. Wooden: There are a number of things to be cleared up; that is one of them.

Trial Examiner Norwood: I shall ask Counsel for the Commission to go on and present his other documents

Mr. Wooden: Well, I would like to know, if possible, when we are going to get a ruling upon the offer made yesterday of the Oklahoma official abstracts and tabulation of the Missouri Highway maintenance quotations.

Trial Examiner Norwood: Just as soon as Respondents' Counsel have had time to check it.

Mr. Paulson: What would be a reasonable time, if Your Honor please?

Mr. Withrow: Three months.

Mr. Paulson: You realize, Your Honor, that the Oklahoma bids don't consist of more than 20 bids or so.

Trial Examiner Norwood: They may have a
19689 week to check those; I mean to check all of these.

Mr. Leisure: That is what I mean.

Trial Examiner Norwood: They have asked for that and I think it is not unreasonable and they should have it.

Mr. Leisure: There is a 2,000 page record in the Texas case alone, from these excerpts they have picked out.

Trial Examiner Norwood: If, as I understand it, the Counsel is willing to close the case subject to the disposal of these papers I can right now appoint a time when I shall convene the hearing to hear Respondents' testimony and between now and then he may have his choice as to when we come here and dispose of these papers, allowing time to get witnesses between that time.

Mr. Leisure: The only difficulty of that, if you call it closing the case today and then giving us an intermission; it works like this: We are spending time checking the exhibits and when they do close their case we should have an opportunity to prepare our own case.

We have been preparing our case, I don't mean we have not, but we should have some time and if Your Honor
follows the suggestion you are making now, that he
19690 rest subject to these exhibits it means we will be spending part of our time when we should be preparing our case.

Mr. Wooden: Checking is a clerical job.

Mr. Zimmerman: Nobody is going to do the checking for me but myself and I can't work on that and the preparation of any intermediate motions I want to make of preparations for such defense as I want to make.

Mr. Paulson: Your Honor, I propose we bring the Missouri tabulations back in here and check them in the court room because we can do those in two hours.

You can read those figures on that chart and terms and conditions in two hours.

Mr. Zimmerman: I have never seen such an example of such unconscionable conduct as this, in my life, when they

delay for a month the offering of exhibits that they should have offered and multiply the work that we have to do.

Trial Examiner Norwood: I am going to give the Repondents one week all told to check on these things and make the objections.

Mr. Paulson: That doesn't get the matter settled, if Your Honor please,—

19691 Mr. Wooden: I offer at this time the exhibit previously marked for identification as No. 2598-A, 2598-B, and 2598-C, which was identified at Kansas City by Mr. McClendon from the Oklahoma Highway Commission as being the official minutes of the State Highway Commission under date of February 9, 1931.

Mr. Leisure: Without taking up time in the court room we will read this in connection with the other exhibits.

Trial Examiner Norwood: That is a very short exhibit. I think you can give us your reaction on that now.

Mr. Zimmerman: Does he mention the page of the record where that was identified?

Mr. Wooden: No, I don't have it.

Mr. Zimmerman: My recollection is it was not properly identified.

Mr. Leisure: If we are going to have a week to check exhibits I thought we might check them all at once.

Mr. Wooden: You won't be able to check that with anything.

Mr. Leisure: But I want to read it.

19692 Mr. Zimmerman: If you would mention, when you offer one of these exhibits, mention the page of the record upon which it was identified, as you claim. If it had been offered at the time it was identified we wouldn't have to do that, but certainly counsel can do that.

Mr. Wooden: I would be glad to do it if I had it but I don't have it, in that case.

Trial Examiner Norwood: Now, Mr. Wooden, I

19693 can give you, I think the record reference on some of those.

Mr. Wooden: Thank you.

Trial Examiner Norwood: What was the last exhibit?

Mr. Withrow: 2598, I think.

Mr. Zimmerman: While you are looking up those I am going to need this exhibit 2933-A to I, for identification, to check back against the record.

It does not seem to me that it is exactly stated in here.

Mr. Wooden: All right. We will get that for you.

Your Honor will recall, I think on the 24th of January, there were produced before you a considerable quantity of invoices under a subpoena duces tecum and they were numbered at that time.

I now wish to offer in evidence those original papers produced under the subpoena consisting of the following numbers: 2631, sub-numbered 1 to 98; 2633, sub-numbered 1 to 138; 2635, subnumbered 1 to 174; 2637, subnumbered 1 to 94; 2638, subnumbered 1 to 66; 2639, subnumbered 1 to 69; 2640, subnumbered 1 to 7; 2611, subnumbered 1 to 57; 2663, subnumbered 1 to 205; 2665, subnumbered 1 to 18; 2667, subnumbered 1 to 38; 2669, subnumbered 1 to 66; 2671, subnumbered 1 to 31; 2673, subnumbered 1 to 40; 2675, subnumbered 1 to 9; 2677, subnumbered 1 to
79; 2679, subnumbered 1 to 27; 2681, subnumbered 1
19694 to 20; 2683, subnumbered 1 to 64; 2685, subnumbered
1 to 38; 2687, subnumbered 1 to 19;—

Mr. Paulson: (Continuing) 2689, subnumbered 1 to 10; 2691, subnumbered 1 to 47;—

Mr. Zimmerman: Pardon my interruption just a minute. Are these matters that you say were identified in the record some where?

Mr. Wooden: These were produced under subpoena on subpoena duces tecum January 24, and were accompanied by a certification as to their being correct, authentic documents, or copies of documents from the files of the company; invoices.

19698 Mr. Wooden: Your Honor, I had not supposed it was necessary to observe—I did observe that these were invoices in actual sales transactions, and in any case involving charges such as involved in this case, the actual sales and destination prices in actual transactions to dealers,—I do not think any further offer of proof should be
—necessary to make them appear to be relevant and
19699 clear.

19700 Trial Examiner Norwood: Any further objections?

Mr. Wooden: Do you object to them on the ground that they are not sufficiently authenticated?

Mr. Zimmerman: Well, I know nothing about their authentication.

Mr. Wooden: You know as much as anybody else.
19701 Mr. Zimmerman: At all.
Mr. Wooden: You know as much as anyone else.
Mr. Zimmerman: Then, I take it, that nobody knows anything about their authentication, and perhaps I best, under the circumstances, add that to my objection.
Trial Examiner Norwood: Any further objections?
Mr. Leisure: Yes, Your Honor.
We object to all of them as incompetent, irrelevant, and immaterial, and we submit that from the showing that Counsel has made as to the reason he wants to offer them, this record, with the already overburdened number of exhibits that it has, should not be increased by several thousand more exhibits on statement of Counsel as to why he wants them offered in evidence. I think Counsel should be required by Your Honor to state some definite reason as to why it is necessary to put in a group of exhibits like that. I do not think he has made any such showing.
Mr. Wooden: I will state one reason—
Trial Examiner Norwood: I examined those. They were delivered to me under the subpoenaes, and, as Counsel suggested, I examined them immediately as to their relevancy and materiality, and I found that they were—I find that this contains valuable data as to prices and methods and terms, and so forth, and are food for a great
19702 deal of study to throw light on the transactions, and I shall overrule the objections and receive them as marked.
(COM. EXS. 2631-A, 2633, 2635, 2637, 2638, 2639, 2640, 2641, 2663, 2665, 2667, 2669, 2671, 2673, 2675, 2677, 2679, 2681, 2683, 2685, 2687, 2689, 2691, 2693, 2695, 2697, 2699, 2701, 2703, 2705, 2707, 2710, 2711, 2713, 2715, 2717, 2720, 2722, 2724, 2726, 2728, 2730, 2734, 2736, 2732, 2738, 2740, 2742, 2744, 2746, 2748, 2750, 2752, 2754, 2756, 2758, 2778, 2779, 2781, 2782, 2784, 2786, 2788, 2790, 2792, 2794, 2796, 2798, 2800, 2802, 2805-A, B, C, D, E, F, G, H, I, J. K, L, M, N, O, P, 2732, 2785, 2787, 2789, 2791, 2793, 2795, 2797, 2799, 2801, 2803, 2804-A, 2804-B, 2783, 2725, 2706, 2704, 2702, 2759, 2700, 2735, 2733, 2729, 2731, 2727, 2723, 2721, 2719, 2718-A, 2718-B, 2714, 2716, 2712, 2690, 2694, 2708, 2692, 2682, 2686, 2684, 2688, 2664, 2666, 2668, 2672, 2670, 2674, 2676, 2678, 2680, 2757, 2755, 2753, 2751, 2749, 2747, 2743, 2745, 2741, 2739, 2737, 2696, and 2631-B, were offered and received in evidence.)

19703 Mr. Wooden: I would like to state one reason for offering the original basic data in this way, and that is that we had hoped to avoid the necessity of using larger quantities of original material by the method of tabulations, but that did not work out very well, so we are using a method about which there can be no question.

19704 A. H. TACKETT was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

19705 *Direct Examination by Mr. Wooden.*

Q. Mr. Tackett, when you appeared before in this proceeding as a witness, you were asked, according to the record, to identify papers marked for identification as Commission's Exhibits 5-A and 5-B, which I believe you did.

(Indicating) I am now showing you, in connection with those papers marked 5-A and 5-B, other papers that are marked Commission's Exhibits 5-C, 5-D, 5-E, and 5-F, for identification (handling documents to witness).

Will you state where you first saw those papers, and when?

A. (Witness examines documents) Well, I don't know if I can state where and when I first saw them, Mr. Wooden. I can state what they appear to be.

Q. Can you say what they are?

A. Yes.

Q. Well, have you had anything to do with them? State what if anything you had to do with them.

(Witness examines documents.)

Mr. Zimmerman: May I ask is the witness merely examining the documents to see what he can learn from the face of the documents, or does he have any independent recollection?

19706 The Witness: I am trying to identify these documents.

Mr. Zimmerman: Not from something on the face of them.

The Witness: No, I understand.

Trial Examiner Norwood: I think Counsel can bring that out later, if he wants to.

Let the witness answer.

Mr. Zimmerman: You see, the difficulty is, the record does not show what the witness is doing, if your Honor please.

Mr. Wooden: It shows he is looking at the papers.

Trial Examiner Norwood: Let the witness answer.

Mr. Zimmerman: All right.

Trial Examiner Norwood: If he is doing what you say, you can bring it out on cross-examination.

Answer the question.

A. Exhibit 5-C, also 5-D, and 5-E, and 5-F, appears to be a continuation—

Trial Examiner Norwood: Wait a moment.

Answer the question: Did you have anything to do with those?

By Mr. Wooden:

Q. Anybody can tell what they appear to be, Mr. Tackett.

Trial Examiner Norwood: Yes.

1970 By Mr. Wooden:

Q. I want you to tell what they are, if you can.

A. (Witness examines papers) I would like to say this off the record to the Judge.

Mr. Zimmerman: Well, now, which question is he to answer, whether he had anything to do with them? I think that is still the pending question.

Trial Examiner Norwood: I think so. Just tell us what you had to do with this.

The Witness: I would like to have the record read that I testified to before.

By Mr. Wooden:

Q. Do you want to look at it? (Handing record to witness.) Page 71.

Trial Examiner Norwood: To 73.

Mr. Wooden: 71 and 72.

Mr. Zimmerman: May I look on, too, please?

(Mr. Zimmerman stands at the shoulder of the witness.)

(Witness examines papers.)

A. If you want me to repeat what Exhibit 5-A is, it is a reproduction—

Mr. Leisure: No, no. There is a question pending.

Trial Examiner Norwood: What did you have to do with it?

19708 A. Well, I—I can't jump right into the middle of something and say what I had to do with it without any qualifications or any other—

Trial Examiner Norwood: Answer it in any way you want to.

Mr. Zimmerman: Except, that I would like to have him tell what, if anything, he had to do with it.

A. I want to make sure that is a reproduction of something that I had to do with, and until I know I cannot testify about it.

Mr. Zimmerman: If he does not know—

By Mr. Wooden:

Q. The question is, what, if anything, you had to do with it.

Trial Examiner Norwood: Go ahead and tell us.

By Mr. Wooden:

Q. Tell us what, if you can, you had to do with any of those papers.

Trial Examiner Norwood: Or the originals from which they were made.

A. I would like to say that it appears to be a reproduction of a table—

Mr. Zimmerman: What it appears to be—

The Witness: This is a report.

Trial Examiner Norwood: Yes.

19709 By Mr. Wooden:

Q. You are referring now to Exhibit 5-A?

A. The exhibits you asked me to identify.

Trial Examiner Norwood: Yes.

The Witness: Are connected with 5-A.

By Mr. Wooden:

Q. Yes, but you are speaking of 5-A when you say what it appears to be, are you not?

A. Exactly.

Q. Well, my question was asking about 5-C, 5-D, 5-E, and 5-F.

A. I can't give you a complete answer unless I can show the relation of those exhibits to this exhibit.

Q. Well, I do not just tell you—

Trial Examiner Norwood: Go ahead and do that.

Mr. Zimmerman: Well, I understand the witness is going to tell us what, if anything, he had to do with these exhibits.

By Mr. Wooden:

Q. If you want to tell us what you had to do with 5-A as a part of your answer as to anything you may have had to do with the ones I asked you about, why, that is all right.

Trial Examiner Norwood: Or the originals from which these were made.

Mr. Zimmerman: Well, as to that, I think we are
19710 taking a pretty long leap. I don't know whether these were made from some original or not. Maybe the witness does.

Mr. MacIntyre: Let the witness answer, if you please.

Trial Examiner Norwood: Let him tell about that.

The Witness: What is the immediate question you want me to answer?

By Mr. Wooden:

Q. What, if anything, you had to do with the papers marked for identification 5-C, D, E, and F—

Mr. Wooden: Is F the last one?

The Reporter: Yes.

A. Exhibits 5-C, D, E, and F, were compiled under my direction to identify companies represented by numbers on—I can't repeat the other exhibit—I am not permitted to, I suppose, on the—

Trial Examiner Norwood: On the white book?

By Mr. Wooden:

Q. You can refer—

Mr. MacIntyre: Give the answer.

A. On Exhibit 5-A.

Q. Compiled under your direction from what?

A. From the records of an investigation into the cement industry which I had charge of and on which a re-
19711 port was made to the Congress of the United States.

Q. Are the papers marked Commission's Exhibits 5-C, D, E, and F, are they a part of the papers that were marked 5-B?

A. They are a continuation of the paper of the date as shown on the paper marked 5-B.

Q. Was 5-B compiled under your direction in the same way as 5-C, 5-D, 5-E, and 5-F were?

A. It was.

Q. And when you say compiled from records in the Federal Trade Commission, what records did you refer to?

A. The files composing the record of the investigation which I had charge of into the cement industry.

Q. Will you state whether or not the information contained on Exhibit 5-A was information that was furnished to the Commission by the respective companies?

Mr. Zimmerman: I object to that. That is asking for a conclusion.

It is asking for him to give us a conclusion as to whether or not this is a copy of something which has not been produced for our inspection and which we have a right to have produced for our inspection so that we may examine the witness upon it.

The original data is the thing that should be produced.

Mr. Paulson: That, certainly, isn't an objection. It may go to the identification, but he can ask the question, the question isn't objectionable.

19712

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Leisure: The question is further objectionable—

Trial Examiner Norwood: This witness was in charge of that investigation and he knows where the information came from.

Mr. Leisure: The question is further objectionable as being highly suggestive and very leading.

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. The figures on Exhibit 5-A were compiled from information furnished the Commission by the companies themselves in response to a questionnaire letter addressed to the several companies.

By Mr. Wooden:

Q. State whether or not the companies whose names are listed on Exhibits 5-B to 5-F, inclusive, are the ones which furnished the information from which 5-A was compiled.

Mr. Zimmerman: I urge the same objection to that as I make to the previous question.

This is not original data and it is not proper to produce this and offer it in lieu of the original data without having

the original data produced against which, at least,
19713 we might check.

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. As I recall the companies shown on Exhibits 5-C, D, E, and F, furnished the information from which Exhibit 5-A was compiled.

That is as positive as I can state.

Mr. Wooden: Now, your Honor, I re-offer these Exhibits 4-A and 4-B, and 5-A to 5-F, inclusive (handing documents to Mr. Leisure).

Mr. Zimmerman: Without regard to the contents of them, I object to them; that there has been no proper foundation laid for them; no data has been produced or offered here from which we might compare or check.

The information is pure hearsay. There is no showing whatsoever that it is competent at all.

The showing thus far made forms no proper foundation.

Trial Examiner Norwood: Is there any further objection?

Mr. Leisure: May I ask the witness a question on voir dire?

Trial Examiner Norwood: Go ahead.

Examination on Voir Dire by Mr. Leisure.

19714 Q. Mr. Tackett, on this Commission's Exhibit 5-A, for identification, which is the long printed exhibit, do you recall it from having looked at it?

A. Yes, sir.

Q. What did you do, personally, or what did you have to do with it, and I call your attention to the fact that on page 71 of the record you were asked about that and this was identified before you stated what it appeared to be.

Will you look at 5-A and tell us what you personally had to do with it, if anything?

A. It was compiled by—

Q. I am talking about you, sir; not what somebody else did.

A. It was compiled by clerks under my direction.

Q. And did you, at the time, supervise the preparation, so that you can vouch for its correctness and accuracy and did you see it after it was prepared?

A. I did not verify each figure from the original source.

Q. What did you do, if anything, with regard to verifying the document 5-A, in any way?

A. I had clerks assigned to the work compile it and clerks verify it.

19715 Q. And they did it?

A. They did it, yes; under my direction and supervision.

Trial Examiner Norwood: Did you verify parts of it or check it in any way?

The Witness: I wouldn't attempt to say what particular parts, if any, are verified from original sources.

By Mr. Leisure:

Q. Did you certify to its correctness to the Commission or anybody else?

A. It was included in a report which I made for the Commission to the Congress, and was, to the best of my knowledge, accurate.

Trial Examiner Norwood: Any further questions?

By Mr. Leisure:

Q. I notice here in the first column, the lefthand side, they used mill numbers all the way down. Do you know why that was done?

A. That was done at the time to avoid, as I recall, identification of the separate companies and to save space.

Q. Now, this original data from which you say that this original exhibit was prepared; do you have it in the courtroom at the present time?

A. I haven't, no.

Q. You do not have it here?

A. No, sir.

19716 Q. But this is a tabulation, as you have said, of certain other original data which you do not have present in the courtroom?

A. Yes, sir.

Q. Now these Exhibits 5-B, C, D, E, and F, I understood you to say that they were prepared under your instructions; is that correct?

A. That is true, yes.

Q. Will you give us the circumstances surrounding your instructions? What happened, Mr. Tackett, which caused you to give those instructions, if you remember?

A. As I recall now, I was requested to do that in con-

nection with this case although the original work sheets showed the companies that corresponded to those numbers. The original work sheets were made at the time the report was compiled.

Q. So, then, am I correct in saying, as to Exhibits 5-B, C, D, E, and F, they were prepared as a result of someone connected with this case, connected on the side of the Commission on this case, asking you to prepare it?

A. As I recall, that is true.

By Mr. Zimmerman:

Q. You have said, to the Examiner, that these tabulations formed a part of the report that you made to the Congress which you believed to be correct. Now,
19717 your belief depended entirely upon what you presumed your clerks had done in accordance with your instructions; is that not so?

A. That is true; yes, sir.

Q. And it did not at all depend upon any personal check or examination which you made at the time to determine whether or not they had done it correctly or accurately?

A. I believe I answered that. I would not attempt to say to what extent.

Q. If any. That was so?

A. Yes.

Q. So, then, we will fairly assume you did not make any personal check or examination?

A. I would not say I didn't make any.

Q. On the other hand, you wouldn't say you did? You would not say you did make any check of any particular figure or group of figures on there?

A. I wouldn't say that I did or did not.

Q. Now, what was the report that you referred to as the one that was made to the Congress? How, otherwise, would you describe it?

A. I would have to get a copy of that report to identify it.

Trial Examiner Norwood: Is it a published report of the Commission?

The Witness: That was a published report of the Commission, yes.

19718 By Mr. Zimmerman:

Q. Was it this report known as Third Congress, First Session, Senate Document No. 71, Cement Industry,

which we sometimes refer to as the White Book, published in 1933? Is that it (handing document to the witness)?

A. That appears to be the document.

Q. Yes. Thank you.

Now, you say that you made that report to Congress?

A. I prepared that report for the Commission to make to Congress.

Q. That is to say, it was assembled by clerks who were working in your department?

A. That is true. I didn't personally make it; it was by the Commission; made for the Commission and presented by the Commission to Congress.

Q. Simply a matter of your assembling it, but they presented it to Congress?

A. Yes.

Mr. Zimmerman: That is all.

I renew my objection. It is clearly shown that the witness has no personal knowledge which would make it possible for him to authenticate this document at all. We might just as well take this book and offer that because it appears in the book.

Mr. Leisure: There is another offer made at the 19719 same time. Should we complete that?

Trial Examiner Norwood: The people who were under you making that, was it their regular duties?

The Witness: It was their regular duty. They were assigned to me for that work.

Mr. Wooden: I would like to ask one question about that.

Mr. Leisure: Do you want me to complete this offer?

Trial Examiner Norwood: Had you completed your objection?

Mr. Leisure: No, because there were two groups of exhibits offered at the same time, and I only took up the first one.

Mr. Zimmerman: May I just say that the record should show that my objections were made to apply to Commission's Exhibits 5-A to 5-F, inclusive?

If I may ask the witness this one question:

By Mr. Zimmerman:

Q. The answers that you made in response to my questions you understood did apply to all this whole group of papers fastened together and marked Commission's Exhibits 5-A to 5-F, inclusive?

A. Yes, sir.

Mr. Zimmerman: Thank you.

By Mr. Leisure:

19720 Q. Mr. Tackett, on Commission's Exhibits 4-A and 4-B, did I understand that you prepared that personally?

A. No; I wouldn't say that I prepared this personally.

Q. How was it prepared?

A. Under my direction by employees of the Commission.

Q. And who gave you instructions to have it prepared? Was that also someone in connection with this case?

A. To have—

Q. To have this done?

A. Let me look at that again, please.

(A document was handed to the witness.)

Q. There is a "B" on it, too; there are two pages.

A. May I ask if this was identified in the record before?

Mr. Wooden: Yes.

A. The Exhibit 4-A was compiled in connection with my work on the report for the Commission in 1933.

Q. What about 4-B?

A. 4-B, the identification of the companies, was compiled at the request of someone in connection with this case, as I recall it.

Q. And then you had it done as is shown on 4-B after you received those instructions from someone in the Federal Trade Commission?

A. Yes, sir.

Q. Have you in the courtroom the original rec-
19721 ords from which 4-A was compiled? Do you have them here at the present time?

A. I have not.

Q. But it is a tabulation of certain original records which you had in your office?

A. Yes, sir.

Mr. Leisure: Now, if Your Honor pleases, we object to Exhibits 4-A and 4-B and to 5-A to 5-F, inclusive, the witness' testimony having shown that they are mere tabulations made from certain original records which he doesn't even produce in the court room and such tabulations could not possibly be received except by stipulation.

Perhaps something of that sort can be worked out, if counsel wants to put in a tabulation that is material and relevant. He wouldn't want to put in this entire amount of records if they are not material and relevant, but certainly they are not admissible as tabulations in the absence of the originals, and we object to them as they stand now as being incompetent, irrelevant, and immaterial.

Trial Examiner Norwood: What sort of information is contained in these tabulations?

Mr. Wooden: The witness can answer more readily than I.

19722 Mr. Zimmerman: You can tell from the documents themselves and I have no objection for either Mr. Wooden or the witness stating off the record about that, but I have an objection if it is on the record.

Trial Examiner Norwood: I didn't ask the witness, I asked Mr. Wooden.

Mr. Wooden: I would have to look at them before I could tell you, myself.

Trial Examiner Norwood: This is sales data—

Mr. Wooden: —production and shipments, mill nets, and things like that.

Trial Examiner Norwood: These were included in the Commission's report to Congress, is that right?

Mr. Wooden: The tabulations were included in the report.

The supplementary data attached to the tabulations show the identity of the company whose figures are given on the tabulation.

Trial Examiner Norwood: In other words this first part, 5-A, is simply a reproduction of part of that report to Congress, is it?

Mr. Wooden: I think that is it.

Trial Examiner Norwood: And this other is just a glorified index to that, or a key?

Mr. Wooden: It is an identification key.

19723 Trial Examiner Norwood: I shall overrule the objection and receive the Exhibit 5-A, 5-B, 5-C, 5-D, 5-E, and 5-F, as marked.

(COM. EX. 5-A, 5-B, 5-C, 5-D, 5-E, and 5-F was offered and received in evidence.)

Mr. Leisure: 4-A is not in the white book.

Trial Examiner Norwood: Let me see it, then.

(A document was handed to the Examiner.)

Trial Examiner Norwood: What is 4-A?

Mr. Leisure: That is it that I just handed you.

Mr. Brick: 5-A is the only paper among the entire two groups which is in the white book.

Trial Examiner Norwood: I will change the ruling there, if it is not clear. My ruling about receiving the documents applies only to 5-A, B, C, D, E, and F.

Mr. Wooden: I think 4-A, just speaking without examination, I think it is taken from the white book. It is not a photograph like the other one was, but I think it is a reproduction of the tabulation in the white book, if I am not mistaken.

Trial Examiner Norwood: Why don't you put in the white book and put in this key index to it?

Mr. Wooden: It is just this portion of the—

19734 Trial Examiner Norwood: I know, but nobody has certified to the correctness of those figures.

Mr. Wooden: I think he did on his previous appearance.

Mr. MacIntyre: He has testified to that beginning on page—

Trial Examiner Norwood: Page 69, compiled on information from the cement manufacturers to the Federal Trade Commission.

I think you will have to get the original information on that unless it appears in this public document.

Mr. Wooden: I think it does appear, Your Honor, in the public document.

In fact, Mr. Tackett can tell whether it does or not. He is more familiar with it than I.

Mr. Zimmerman: I would like to ask a question for the record, if I may. I am a little at a loss to understand Your Honor's ruling.

It seems to me that the effect of it is that whatever has been included in the public document which we refer to just for convenience as the white book, we all understand what it is; that is, the Senate document; because I suppose it is a matter of being a public document, would

19725 be admissible in the record so far as it pertains to anything in connection with that case. Is that about the size of it?

Trial Examiner Norwood: As a public document the Commission may take judicial notice of it, but as a matter of convenience this excerpt goes in.

Now that key, there, is to enable you to interpret that and it was made under this man's supervision in due course of business and it is merely a device for convenience to identify these companies.

Mr. Zimmerman: I suppose that rule works both ways. I suppose that the Respondents might, on their turn, offer some page or something of that sort from this white book with no more showing than that it was a correct copy from the white book?

Trial Examiner Norwood: I think so, yes.

Mr. Zimmerman: Thank you. I just wanted to get it clear.

Trial Examiner Norwood: You see, this is a little more than just a case between parties.

I don't see why, if that is a copy of something that is in the white book you might not just offer certain pages of the white book.

Mr. Wooden: That is what that is, in substance, I think, Your Honor.

Trial Examiner Norwood: And in connection 19726 therewith you can offer these key numbers, here.

You have a witness on here who can identify those companies referred to in here.

Mr. Zimmerman: I don't think his testimony adds a thing.

He has been very frank about it, but he really, personally, doesn't know a thing more about that than I would.

The thing really depends upon the thing being this public document; this Senate document No. 71.

Trial Examiner Norwood: He is here for the purpose of identifying those key numbers.

Mr. Zimmerman: I don't think he could do that with any more show of authority than anyone here in the room.

Trial Examiner Norwood: Well, I did think so.

Mr. Zimmerman: I don't think it shows he had any personal knowledge.

Mr. Wooden: The witness' testimony about 4-A appears on pages 68 and 69; 4-A and 4-B.

He has already testified, Your Honor, page 69, that Exhibit 4-A appears to be taken from the report made to the Senate.

Trial Examiner Norwood: I don't think that is satisfactory.

19727 Mr. Wooden: Well, I will ask him a question, then.

Direct Examination by Mr. Wooden (Continued).

By Mr. Wooden:

Q. Well, I ask you to state whether or not it was taken from that report, Mr. Tackett.

Trial Examiner Norwood: Why don't you introduce the page of the white book it refers to?

Mr. Wooden: I think this is a copy of it.

A. This is a copy of part; of page 12 of the white book, it appears to be, at least.

Trial Examiner Norwood: I will receive page 12 of the white book and receive that key sheet to be used in connection therewith.

Mr. Zimmerman: As being matter taken from the page 12?

Trial Examiner Norwood: Yes; the white book.

Mr. Wooden: And 4-B is the key.

Mr. Leisure: Where does that leave us?

I understood Mr. Tackett to say—and I wish he would correct me, if I am wrong—that that was prepared in conjunction with his work in preparing the data for the white book; not that it was copied from the white book.

(Addressing the witness) Isn't that what you 19728 said 4-A was?

Mr. MacIntyre: He is not receiving that in evidence.

The Witness: I don't recall what the record shows how I answered the question, when this was identified.

Mr. Leisure: What is the fact about that 4-A?

Mr. MacIntyre: If Your Honor please, why continue talking about 4-A when you have rejected it and accepted in evidence page 12 of the particular book? Why does Mr. Leisure continue to cross-examine this witness on that since you have ruled?

Mr. Leisure: If that is withdrawn I will not spend a minute cross-examining him on it.

Trial Examiner Norwood: I stated I wouldn't receive that page if offered, 4-A, and then, as based on the data on page 4-B I will receive that to be used in connection with that page 12 of the Senate report.

If Counsel offers it now, I will receive it.

Mr. Wooden: I will give notice now I intend to offer it as soon as I get a copy of page 12.

Do you want somebody like Mr. Tackett to come back to the stand and identify page 12?

Mr. Zimmerman: You mean to have somebody
19729 come back and testify, by comparison with the pages, it is a true and correct copy of page 12 of the white book; is that the size of it?

Mr. Wooden: That is what I understood would be the size of it.

Mr. Leisure: It does not appear that this witness copied these pages from the white book and that they are being offered on some theory that they are parts of public records.

The facts are these were made from original data which original data were never produced in the court room.

Mr. MacIntyre: And ever since this report has been published in the United States as if it were made from some original census taker's report that walked from house to house and, of course, when anybody gets ready to produce a piece of a census report showing the population of Detroit, he doesn't have to go out and get the Supervisors of the census to bring the original entries of John Doe's family and how many kids he has got to establish the printed census.

19730 Mr. Zimmerman: With due respect to Counsel, I think we have lost the procession and are following the garbage wagon.

Mr. MacIntyre: I think so, too, Your Honor; it is reduced to an absurdity.

Trial Examiner Norwood: On the record.

I see no reason why we cannot receive that page, and let this be supplied.

Mr. Wooden: All right, Your Honor. I think you will find on pages 68 and 69 of the transcript Mr. Tackett's testimony about Exhibit 4-A, what it is, and what it is based on.

Trial Examiner Norwood: Counsel withdraws Commission's Exhibit, for identification, 4-A, and substitutes therefor page 12 of the Congressional report heretofore referred to, and proffers it, and page B heretofore proffered in evidence.

The objection is overruled and they are received in evidence.

(The document heretofore marked for identification as

Commission's Exhibit 4-A was withdrawn, and page 12 of the Congressional report heretofore referred to was re-marked as Commission's Exhibit 4-A.)

19731 (COM. EX. 4-A and 4-B, were offered and received in evidence.)

Mr. MacIntyre: And the document, Your Honor please, if you refer to page 12, is contained in Senate Document No. 71, 73d Congress, First Session, a pamphlet entitled "The Cement Industry."

Trial Examiner Norwood: Yes.

Mr. Zimmerman: But I think we have always referred to its as the White Book, and that is sufficiently descriptive.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: I would like to say that I do offer with the Examiner on the basis of his ruling, and I do object to the admission of the documents in evidence,—merely as preserving my objection.

Trial Examiner Norwood: That is Counsel's high privilege.

Mr. Leisure: If page 12 has been offered, Your Honor, we have not stated an objection, and I want to state one, that it is in our opinion incompetent, irrelevant, and immaterial.

I do not know of any reason why, or any rule of evidence that would make a report of the Federal Trade Commission to the Senate binding against the Re-

19732 spondents in this case. If that were true, they could offer this book and not take any evidence, because the whole book condemns the cement industry, and they would not need to offer any more evidence, and I do not think there is any distinction between one page and another. The fact that this happens to be a tabulation does not make it any more admissible, and I do not think it is binding upon the Respondents and I think it is, therefore, incompetent, irrelevant, and immaterial. It is also hearsay.

Trial Examiner Norwood: I think it being a public document the Commission may take judicial notice, and those pages are put in merely as a matter of convenience.

Now, the key numbers identifying the companies with the date contained in the book is additional evidence that is received to explain the public document.

Mr. Leisure: I would like to ask the witness a question about the supporting data.

19733 *Cross-Examination by Mr. Leisure.*

Q. Has that been preserved, the supporting data for these exhibits which have just been offered?

A. Well, I haven't—I haven't made any check with our file room. We have a regular file division that preserves files, and I don't know.

Mr. Leisure: Mr. Wooden, will you produce the original data from which these exhibits have been prepared?

Mr. Wooden: I don't know, I think I will have to get some advice on it.

Trial Examiner Norwood: I understood, at least, that would be proffered to the Counsel.

Mr. MacIntyre: If Your Honor please, let us understand this now, that according to the witness' testimony all of these figures in these documents about which we have been talking were submitted by the Respondents in this case in letters to the Commission. They, of course, most certainly, have preserved in their files copies of their own letters, or at least parts of their permanent records, showing what their production was and their capacities were for those years, and they are the only statistics that are involved in these particular documents.

Mr. Zimmerman: I wish I could accept Counsel's
19734 statement as evidence, but I am sorry that I cannot. It is just taking time.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: You ought to be glad for anything that takes time.

Trial Examiner Norwood: Yes, I think Commission's Counsel should make the supporting data available,—in fact, I considered that that was going to be done as a matter of course.

I think I shall make my reception of these papers dependent upon that, either the supporting data furnished or a showing that they have been destroyed.

19740 Mr. Wooden: I offer at this time a paper marked for identification as Commission's Exhibit 3109, it being a photographic copy of a report of the Buffington Mill of the Universal-Atlas Company to Professors Clark

and Burns, and was furnished at our request by Mr. Conaghan, representing the Universal-Atlas Company, and I assume there will be no objection.

(Counsel submits document marked Commission's Exhibit 3109 to Counsel for the Respondents.)

19741 Mr. Wooden: I offer at this time, Your Honor, exhibits that were identified by Mr. Mallory when he appeared as a witness, consisting of Commission's Exhibit 2917-A to T, inclusive.

Mr. Zimmerman: What page of the record were they identified at, please?

Mr. Wooden: I am sorry, I do not have that information right now, Mr. Zimmerman.

Trial Examiner Norwood: What is the number?

Mr. Wooden: 2917-A to T; 808-LLL to QQQ; 818-BBBB to FFFF, inclusive; 821-D to J, inclusive; 562-ZZZZZZZ to DDDDDDDD, inclusive.

(Mr. Wooden hands documents to Mr. Leisure.)

Mr. Leisure: We will look over these during the same period of time, Your Honor.

Trial Examiner Norwood: Yes, I will reserve the ruling on those.

19743 —Washington, D. C.,
April 15, 1939.

19748 Trial Examiner Norwood: He was referring to a previous request.

Now, as to this proffer of papers marked for identification, a series beginning Commission's Exhibits 2878-A to T, and the papers marked Commission's Exhibits, for identification, 1455, 1456, 1457, 1458, 1461, for identification, 1462, 1465, 1466, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1479, 1480, 1481, 1482, 1483, 1484, 1486, 1487, 1488, 1489, 1490, 1501, 1507, 1512, 1518, 1521, 1523-A, B, 1574, 1599, 1600, 1607, 1613, 1614, 1617, 1619, 1624, 1626, 1636, 1644-A, B, 1675-A, B, 1678, 1701-A, B, 1708, 1710, 1731, 1735, 1743-A, B, 1765-A, B, 1814-A, B, C, 1965-A, B, 2431, 2434, 2435, which is a proffer that was made, last

19749 made, on March 7th, the objections to these are overruled, and the papers enumerated are received in evidence. I have had these for some time, and I have studied them carefully, and they should be received in evidence.

(COM. EXS. 2878-A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, 1455, 1456, 1457, 1458, 1461, 1462, 1465, 1466, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1479, 1480, 1481, 1482, 1483, 1484, 1486-A and B, 1487, 1488, 1489, 1490, 1491, 1507, 1512, 1518, 1521, 1523-A, B, 1574, 1599, 1600, 1607, 1613, 1614, 1617, 1619, 1624, 1626, 1636, 1644-A, B, 1675-A, B, 1678, 1701-A, B, 1708, 1710, 1731, 1738, 1743-A, B, 1765-A, B, 1814-A, B, C, 1965-A, B, 2431, 2434, and 2435, were offered and received in evidence.)

Trial Examiner Norwood: Now, as for this 1644, I find a paper attached here and it is not just plain what the number is, and I will ask Mr. MacIntyre to straighten that out.

Mr. MacIntyre: The Reporter's number on these papers, if Your Honor please, are 1643 and 1644-A and B.

Trial Examiner Norwood: The first one is what?

Mr. MacIntyre: 1643. The Reporter's number is there.

Trial Examiner Norwood: Include Commission's
19750 Exhibit, for identification, 1643 in the list of those that are received in evidence.

(COM. EX. 1643 was offered and received in evidence.)

19751 Mr. Leisure: With regard to this request that Mr. Wooden made from Mr. Mallory: When Mr. Mallory was here he asked for certain information which he had Mr. Mallory make up and furnish, which is represented by 3045-A to H.

When Mr. Wooden got this and read it, then he asked for certain additional material. We immediately called Mr. Mallory and asked him to furnish the additional material.

I checked again yesterday with him and I find
19752 Mr. Mallory has been ill in bed and was not at his office all last week, so that there is nothing I can do, at the moment.

Mr. Wooden: I didn't ask for additional information; I asked for what I requested before.

Mr. Leisure: I think the record will show I am entirely a hundred percent correct in the statement I made.

Trial Examiner Norwood: Is that offered in evidence?

Mr. Wooden: Yes. I also offer Exhibit 3046-A and B, which was furnished, also, by Mr. Mallory at my request.

Trial Examiner Norwood: Any objections?

Mr. Leisure: If Your Honor pleases, this has to do

with Mr. Mallory's subscribers and statistics; I am now speaking of 3045; and I think we have already stated on the record our objection to this type of evidence.

It does not bear on any of the issues raised by the complaint, and it is our position it is incompetent, irrelevant, and immaterial. We therefore object to it.

Trial Examiner Norwood: You raise no point as to identification?

Mr. Leisure: No, sir. Mr. Mallory got it together in response to Mr. Wooden's request.

19753 (COM. EXS. 3045-A, B, C, D, E, F, G, H, 3046-A, and B, were offered and received in evidence.)

19760 Mr. Wooden: I offer a paper marked for identi-
19761 cation Commission's Exhibit 3110, it being a document obtained by Mr. Paulson from the files of Mr. Mallory; it is a letter to J. S. Reiter, auditor of the Ideal Cement Company, dated January 15, 1934, and offering it with the assumption that further identification will be waived.

Mr. Zimmerman: Regardless of the contents of the instrument, I will say that I will waive any testimony by Mr. Paulson as to where he obtained it.

Outside of that, I will waive nothing.

Mr. Paulson: Thank you, Mr. Zimmerman.

Mr. Leisure: We join in that objection.

19764 (COM. EX. 3110 was offered and received in evidence.)

19772 Mr. Wooden: Your Honor, yesterday an objection was made to the use of tabulations identified by Mr. Tackett, because the supporting data was not proffered therewith, and the question was asked whether I would produce it, and I then said I did not know.

I just desire to state now that we will not only produce it, but we will offer it, so that it won't be necessary to check the oridinal data with the tabulations.

We are now engaged in having numbers given to the original papers.

Mr. Leisure: We certainly object to the so-called supporting data being offered in evidence.

I know of no rule of evidence that would allow some other investigation, without being identified in any way, to be offered in evidence in some subsequent proceeding. It certainly is not material.

Mr. Wooden: The supporting data consists of written

reports by Respondent Companies to the Federal Trade Commission.

Mr. Zimmerman: Who is going to be here to identify them?

Mr. Wooden: Well, now, this begins to show exactly what is going on.

Mr. Zimmerman: Yes, it does. It goes to show
19774 just exactly how loose the methods are that have been used by the Commission, in throwing everything into a hopper here without proper identification, and then complaining because we do not throw down the bars and say "Come on, put it all in."

Trial Examiner Norwood: Well, I do not think that Counsel's remarks are borne out by the facts here. Some things are impossible to have had—we have been very careful about what is received here, and we have received nothing that we have not had a right to receive.

Trial Examiner Norwood: I am not sure I made
19775 myself clear on this, as far as those tabulations are concerned taken from the White Book.

Mr. Zimmerman: You received them in evidence.

Trial Examiner Norwood: The Commission can take judicial notice that those parts of that record are what they are, but I want to make it clear now to establish any particular fact as against the Respondents they could not be used unless the supporting data to those tabulations are offered to the other side.

It is the custom, it is the practice in the Interstate Commerce Commission, and other departments, and it has been approved by the courts, to receive tabulations where the supporting data is made available to the other side, and that is to save these masses of information going in the record.

Mr. Leisure: I want to point out to Your Honor that they were received in evidence yesterday, and received over my objection, and received after the witness testified he did not have the supporting data in court, and the supporting data has never yet been proffered and they are now offering it in evidence. That is the state of the record at the present time.

Trial Examiner Norwood: The Counsel is mistaken about their being received in evidence.

I attached a condition on there when it became clear
19776 to me that the supporting data was not at hand. They were received conditionally, and I think he

can either proffer that supporting data or he is entitled to have it received in evidence if it is identified here, and I think it can be identified as coming from the files of the Commission.

Mr. Zimmerman: It would have to have some more identification than merely coming from the files of the Commission, I think. I think it would have to be identified so as to connect it with the Respondents, and it would have to be shown, of course, that it was relevant and material.

Trial Examiner Norwood: I understand that these are statements of the Respondents.

Mr. Zimmerman: I don't know. I haven't seen them and I don't know anything about them. The only thing I do know is I cannot and will not accept anything here merely on Counsel's statement and without the proper foundation being laid for it.

Mr. MacIntyre: If Your Honor please, since that Counsels for the Respondents are reluctant—or I would rather say unwilling—to take a statement by Counsel for the Commission in the form of unsworn testimony to the effect that these particular documents were received in due course of mail from the Respondents and placed in

19777 the Commission's file, then, of course, it will have to be offered in the form of sworn testimony since it would, over such objection, be probably a little more proper, but let us also add this, as an observation in connection with this offer: We attempted yesterday, just as the Commission attempted when they made that report to the United States Senate in 1931, to protect from disclosure, although there was no pledge that disclosure would not be made—that is, no pledge was made to the cement companies, but nevertheless we sought to protect from disclosure as much information as possible that the cement companies had submitted to the Federal Trade Commission in 1931 and 1932.

That is one of the reasons that the report to the United States Senate merely carried key numbers instead of the names of the companies, so, since there have been so many objections to the tabulations and to a lack of full disclosure to make the picture complete, the Commission now finds it more necessary, I would say, to offer in evidence the full and complete statements that these Respondents or members of the cement industry submitted

to the Federal Trade Commission in due course of mail in response to the questionnaires that they submitted to them.

19778 Now, it may or may not be in accordance with the desire at the present time of those people who submitted those answers to the questionnaires of their full disclosure of capacity and production figures be made in this record, but there is no alternative the Commission has but to put them in the record, and it is most proper, in the light of the objections raised yesterday afternoon.

Mr. Leisure: I want to point out these long objections in the record do not in any wise correct defects in offering proof. They are not evidence in any way, and I submit to offer reports or tabulations from other proceedings without any connection with this case, without our opportunity to cross-examine witnesses, is not proper procedure, and I object to all of this material which Mr. Wooden, a moment ago, said he was offering in evidence as supporting data, as no proper foundation whatever being laid for it, and it is utterly incompetent, irrelevant, and immaterial in this proceeding.

Trial Examiner Norwood: Does the Counsel contend that they may not consider the statements that are made by these Respondents to the Federal Trade Commission?

Mr. Leisure: Well, it all depends. That is a very broad question. It depends on how the statement is made, what the statement is; depends on whether the statement comes within any of the issues raised by the complaint.

19779 It depends on all the rules of evidence.

Mr. Wooden: The only question I can see that is at hand is whether these are authentic statements of Respondents.

I gather, despite previous statements, they will always be ready to concede certain documents were written by the Respondents, but now they will not.

Mr. Leisure: Well, to go back and take up other proceedings and try to offer in evidence holus and bolus, as they are constantly doing, getting barrels full of exhibits, I object to the proceeding, and I think it is improper.

Trial Examiner Norwood: Now the "barrels full of exhibits" can be avoided by the Counsel's waiver of the tabulations.

There is valuable data there about sales, production and so forth.

If Counsel wishes to avoid that, check these tabulations with the original data which may be presented to him.

Mr. Leisure: We have had some experience with Trade Commission tabulations, and we do not propose to accept any tabulations that we haven't checked with the original material.

Mr. Wooden: And we have had some experience
19780 with the Respondents' method of checking and criticism, and we don't propose to use other than the original data.

Mr. Leisure: But you did, since yesterday, you mean.

Mr. Wooden: That was prepared some time ago.

Trial Examiner Norwood: The question is one of identification, first.

Will Counsel waive identification of these documents?

Mr. Leisure: I don't waive anything. I think this is improper, to offer exhibits in this way; to hold them up until the end of the case and dump them in by the wagon load at the end of the case. I think that is improper.

Mr. Wooden: This all goes to Exhibits 4-A and B, and 5-A to F.

Trial Examiner Norwood: The papers will have to be identified.

Mr. Wooden: The papers are in process of numbering, Your Honor.

19781 We might go ahead with some other things that are already numbered.

Trial Examiner Norwood: Yes. All right. Go ahead.

Mr. MacIntyre: Your Honor please, on January 20, 1939, at the Kansas City hearing, we had certain documents that were not, up to that time, offered or received in evidence, identified by witnesses E. E. Woods, and H. O. Warner.

We now offer in evidence some of those documnts so identified, one of them, Commission's Exhibits 458-A-C, and 458-D and E. Those documents were produced under subpoena duces tecum by the Penn-Dixie Portland Cement Corporation,—at least the photostats were produced.

Document marked for identification as Commission's Exhibits 2624-A and B, identified by witness E. E. Woods, January 20, 1939, as a letter written by him to Allen T. Flint, secretary of Mountain States Retail Lumber Dealers Association, concerning activities of the Respondents in this case.

Mr. MacIntyre: When I say "activities of the Respondents in this case," I should add "activities of the
19782 Respondents in this case, and the collaboration of the Respondents in connection with those activities, with the writer of the letter."

Commission's Exhibit 867-YYYYYY, identified as a letter written by Mr. E. E. Woods, identified by him on January 20 as such a letter, to E. J. Moore, Alpha Portland Cement Company in St. Louis. We have one document to which this relates already in the record.

Also, we now offer in evidence document marked for identification as Commission's Exhibit 867-CCCCCCC, or, at least, that was the way that we referred to it at the time that Mr. Woods identified it on Jarnuary 20,—CCCCCCC are not particularly clear on the document, but it was so taken to be CCCCCCC at the time of its identification there. It is a document produced by Alpha Portland Cement Company under the subpoena last year.

The same may be said with respect to Commission's Exhibit 867-YYYYYY, that has just been offered.

We also offer in evidence a letter by the Alpha Portland Cement Company under subpoena last year bearing number for identification 867-BBBBBBB. It will be noted that this is a photostat of a document produced by Alpha Portland Cement Company, the original of which was returned to Alpha; the photostat is not particularly good, so if the Respondents are not particularly satisfied with
19783 the photostat, we will permit them, of course, to substitute the original which was returned to them. We are satisfied, however, with the photostat as it stands.

We also offer Commission's Exhibit, for identification, 2468, a letter which was identified by Witness H. O. Warner on January 20, 1939, as bearing the signature of another official of his company, Chris Dobbin, assistant sales manager of one of the Respondents.

We also offer a document marked for identification as Commission's Exhibit 2470, which Mr. Warner identified as a letter of his to Allen T. Flint, secretary of the Mountain States Retail Lumber Dealers Association.

We also offer a document marked for identification as Commission's Exhibit 2469, which Mr. Warner identified as a letter, to which he replied in the form of Commission's Exhibit, for identification, 2470.

We also offer documents marked for identification as

Commission's Exhibits 737-WW, and 737-AA, documents which were produced by the Oklahoma Portland Cement Company under subpoena a year ago. Witness E. E. Woods, January 20, 1939, identified Commission's Exhibit 737-AA as a letter bearing his signature.

We also offer documents heretofore marked for identification as Commission's Exhibits 737-BB and CC.

19784 They were produced by the Oklahoma Portland Cement Company under subpoena approximately a year ago, and E. E. Woods, on January 20, 1939, identified Commission's Exhibit 737-BB as a letter he had written, and 737-CC as an attachment to that letter.

We can pass these to Your Honor or to Counsel for the Respondents?

Trial Examiner Norwood: Pass them to Respondents' Counsel.

Do you wish to retain those (addressing Mr. Leisure)?

Mr. Leisure: Yes.

Trial Examiner Norwood: Go ahead.

Any further proffers?

Mr. Wooden: Your Honor, when Dr. Fetter appeared as a witness, he was questioned about various portions of a book that he had written entitled "The Masquerade of Monopoly," and he identified the copy which I hold in my hand, and which was marked Commission's Exhibit 2921, for identification.

I am offering, at this time, the book.

Mr. Leisure: Well, now, if Your Honor pleases, you can't very well cross-examine the book.

Mr. Wooden: You did.

Mr. Leisure: Dr. Fetter has stated his theories at length in the book, and if they are to be received

19785 with any consideration or with any weight in this case at all I prefer to have them come from the mouth of the witness who wrote the book so that he could be cross-examined on them, and if the book would be offered, the proper time and the only proper time to have offered it was while he was on the stand and if, as, and when Dr. Fetter does take the stand and testify with respect to that book there are a few more questions I want to ask him, and I object to this book as being incompetent, irrelevant and immaterial.

19786 Mr. Wooden: The witness stated on the stand it would be necessary to consider the whole book to explain the things Mr. Leisure asked him about.

19791 EVERETT MACINTYRE was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Wooden.

By Mr. Wooden:

Q. Mr. MacIntyre, I am showing you papers marked Commission's Exhibits 3181-A to C, for identification, inclusive. What do you know about those papers?

A. Commission's Exhibits 3181-A to C, for identification, is a file copy of a letter sent by H. L. Anderson, Chief Examiner of the Federal Trade Commission, to the West Penn Cement Company, Butler, Pa., under date of May 12, 1931. It is a questionnaire propounding—

Mr. Zimmerman: I object to having him state what
19792 the contents of it are.

Trial Examiner Norwood: He is not stating what the contents are, he is testifying what it is.

Mr. Zimmerman: If it has anything to do with the content, it will show on its face.

Trial Examiner Norwood: Objection overruled.

A. It is a questionnaire propounding 11 questions, similar questionnaires propounding the same questions were sent at about the same date to practically every cement manufacturer in the United States whether manufacturing Portland cement or other types of cement, so far as they were known to the Federal Trade Commission at that time, in connection with an investigation that the Commission was directed to make by the United States Senate under the so-called Norris Resolution in 1931.

By Mr. Wooden:

Q. I am now showing you a collection of papers marked beginning with 3114-A, for identification, and I will ask you to state what you know about those papers, giving the numbers of each as you refer to it?

A. The documents marked for identification as Commission's Exhibits 3114-A to G, are replies to a questionnaire similar to the one that I just made reference to, received from the Edison Cement Corporation and filed in the files of the Federal Trade Commission during 1931.

19793 The documents marked for identification as Com-

mission's Exhibits 3115-A to E, inclusive, were similarly received from the National Cement Comp ny, Birmingham, Ala., and filed in the files of the Federal Trade Commission during 1931.

The documents marked for identification as Commission's Exhibits 3117-A to L, inclusive, are in the forms of replies to questionnaires sent to the Missouri Portland Cement Company by the Federal Trade Commission. These replies were received and filed during 1931.

Mr. Leisure: What was the last number, Mr. MacIntyre?

Mr. Witness: 3117-A to L.

Trial Examiner Norwood: Did you skip 3116?

Mr. MacIntyre: They are not in order. That is why it is necessary to read these numbers out.

A. (Continuing) The documents marked for identification as Commission's Exhibits 3116-A to D, inclusive, are replies to questionnaires sent out by the Commission to the Georgia Cement and Stone Company, Birmingham, Ala. They were received and filed in the files of the Commission during 1931.

Documents marked for identification as Commission's Exhibits 3118-A to BB, are replies to questionnaires sent by the Commission to the Medusa Portland Cement Company, the Manitowoc Portland Cement Company, the
19794 Newaka Portland Cement Company, the Crescent Portland Cement Company, and the Medusa Portland Cement Company. These replies were received and filed in the files of the Commission during 1931.

Mr. Leisure: Your Honor pleases, I wonder if we could save time by simply having a statement that Mr. MacIntyre, as to all of the rest of that group of numbers, would give the same testimony, as I assume is what he intends to do. We would save a half hour, or perhaps an hour.

Trial Examiner Norwood: You can do that, if that is satisfactory to Counsel for Respondents.

Mr. Zimmerman: It would be satisfactory. Then we could cross-examine upon the basis, assuming that he would make the same testimony as to each one.

Trial Examiner Norwood: Yes.

Now, those are all similar, are these numbers all similar documents, are they, from different Respondents?

The Witness: But the name of the company, of course, has not been stated.

Mr. Leisure: That will show on the exhibit numbered.

Trial Examiner Norwood: That will show on the exhibit.

Mr. Wooden: Included among these, Your Honor, are some reports from companies that might have gone out of business since, or might not be Respondents. Most of them are respondents.

19795

Mr. Zimmerman: The point is—

Mr. Wooden: This is a case of supporting data.

Mr. Zimmerman: —they show on their face from whom they purport to be received, and I do not understand that Mr. MacIntyre is attempting to testify from his independent recollection as to these names, but in each case refers to what appears on the exhibit.

Mr. Wooden: Well, we will touch that point.

Trial Examiner Norwood: I think so far as identification is concerned, he may just state the inclusive number there, and state they are all papers similar to the ones he has just described.

Mr. Zimmerman: Yes.

Mr. Wooden: Before you do that, Mr. MacIntyre, can you tell us when, and where, and how you first saw these papers that you are now describing?

The Witness: I saw them immediately after they were received and filed in the official files of the Commission, in response to the questionnaire that we had prepared and sent out some couple of months earlier.

By Mr. Wooden:

Q. Would you state whether or not you handled them in any official way for the Federal Trade Commission at that time?

19796

A. I did, after they were placed in the files, I studied each and every one of them, and made certain designations to tabs that were attached to them, as to what information was to be selected from them for use in the promulgation of the report to the United States Senate in response to the Norris Resolution.

Q. Will you just go ahead now and see—

Mr. Wooden: We are going to stipulate, I believe, that Mr. MacIntyre would give similar testimony as to each and every one of these papers?—

Mr. Zimmerman: Yes.

Mr. Wooden: —that are numbered so and so? I do not have the numbers before me.

Trial Examiner Norwood: The same description applies, then, to all these Commission's exhibits from 3114 to 3176-A to TT, with the exception of the variation in the firm name; is that right; Mr. MacIntyre?

The Witness: That's correct.

Mr. Zimmerman: I am perfectly willing to make that stipulation if we are permitted,—I think we ought to be permitted to make such cross-examination as we may desire before they go on to something else.

Trial Examiner Norwood: I think so.

Mr. Wooden: I haven't formally offered them, yet, but I will offer all these papers that Mr. MacIntyre has testified about and about which a stipulation was made
19797 that he would give similar testimony as to the others included within those numbers, and I also offer 3181, for identification, which is the form of questionnaire to which these other exhibits are replies.

I offer them on two grounds, as supporting data for the Exhibits 4-A and 4-B, and 5-A, B, C, D, E, and F, and also in the case of Respondent companies as containing statements which are receivable, in my judgment, as admissions.

Trial Examiner Norwood: Do you wish to cross-examine him on this identification?

Mr. Leisure: As to that, your Honor, I have this suggestion to make: Instead of sitting completely through the noon hour today, any questions we had to ask Mr. MacIntyre about these could be asked when we make our objections, if we have any questions to ask, and that would give us a time to look at the documents.

Trial Examiner Norwood: You can't cross-examine him on the documents. You can cross-examine him on his identification.

Mr. Leisure: That is what we mean.

Mr. Zimmerman: I think we might as well do that and save time.

Mr. Leisure: I think we could, too, but we will cross-examine him now if there is objection to it.

19798 Trial Examiner Norwood: There is nothing in those documents which would help you at all on that.

Mr. Leisure: I was thinking of saving time over the noon period, that is all.

Examination on Voir Dire by Mr. Leisure.

Q. Mr. MacIntyre, on this letter of May 12, 1931—

A. All of them weren't dated May 12.

Q. I am referring to just this one, the one that is dated May 12, 1931, and it is marked for identification as Commission's Exhibit 3181-A to C.

A. Yes, sir.

Q. I understood you to say that this letter was sent out by Mr. H. L. Anderson. Were you present, Mr. MacIntyre, when Mr. Anderson dictated this letter?

A. Mr. Anderson did not dictate the letter.

Q. Were you present when this paper that I hold in my hand was dictated?

A. When it was formulated, you mean?

Q. No, when it was dictated.

A. The letter—yes, as to the parts of the letter that went into that letter, yes.

Q. I didn't ask you that. I am asking you whether or not you were present when this Exhibit 3181-A to C was dictated.

A. It was not dictated; it was copied, Mr. 19799 Leisure, from a form letter.

A form letter was formulated and approved by Mr. Anderson and sent to the stenographic division for copies to be made to a number of cement companies, the names of which were sent, also, to the stenographic division at that time.

Q. And that is your extent of the knowledge of the letter?

A. No.

Q. All right. What else do you know?

A. When those letters were received back from the stenographic division and were checked with the form letter which had been sent up containing the questions that were desired answered by the different companies, then they were sent on to the Chief Examiner for his signature, Mr. Anderson,—for his signature and for dispatch to the various companies to whom they were addressed.

Q. You say "these letters." I am not, at the moment, Mr. MacIntyre, taking up any other letter except this one, 3181-A to C.

A. That is one of the typed copies of the form letter that went to the stenographic division for typing.

Q. What I want to know is whether or not you were present when it was copied or when it was dictated.

A. I was not present when it was dictated. I was present and participated in the formulation of it.

Q. In this 3181-A to C?

19800 A. That is a copy of the form letter which was so formulated.

I have stated I was not present when that was copied from the form letter.

Q. Were you present or did you participate in the dictation of the original from which this letter was copied?

A. I did participate.

Q. Well, how did you participate?

A. In helping form the questions that made up the form letter.

Q. Did you dictate the form letter when it was dictated?

A. No, but I checked it with the formed questions that were included in it before it went to the stenographic division for copying.

Q. That is, the final form from which this was copied?

A. I saw it and checked it, yes.

Q. After that was done, when it was copied, as you say it was, what, if anything, did you have to do with 3181-A to C, when it was sent out?

A. It was transmitted, after it was checked with the original form, to the Chief Examiner for his signature, and dispatched to the addressee.

Q. You say it was this and it was that; I am not interested in what was done. I am asking you what you did.

A. I did not dispatch, neither did I sign it for

19801 Mr. Anderson.

Q. And you were not present when Mr. Anderson did sign it, were you?

A. No, but I recognize his handwriting, and those are his initials at the bottom of that letter.

He is dead, now.

Q. And you weren't present when it was posted, either, were you, Mr. MacIntyre?

A. No, I was not.

Q. Now, as to Commission's Exhibits 3114-A to G, for identification, you say it was received from the Edison Company. Were you present—did you receive it personally?

A. No, it was received in the Mail and File Section of the Federal Trade Commission and placed in the files here.

Q. That is, after it was received it is your assumption that it was received from the Edison Company because of certain material that appears on the face of the document?

A. No, with respect to the Edison reply my knowledge of it is not restricted to that.

I did, however, see the letter here after it was stamped and in the files. That was the first time I had seen it in the Federal Trade Commission's offices, but previous to that I was in New York while the Edison Company was preparing its answers to the Commission's questions, and I talked to Mr. Cloos, C-l-o-o-s, and discussed some of
19802 the questions and some of his replies to those questions with him when I was in New York City.

Q. Of course, I didn't ask you anything about that, Mr. MacIntyre. I am asking you what you saw with respect to 3114-A to G when it reached the Federal Trade Commission, and, as I understand you, you saw it after it was in the files, and that was the first time you ever saw it?

A. In its finished form, that was the first time I saw that letter.

Q. And as far as you know, of your own knowledge, when you say it was received from the Edison Company, you are basing that information from what you see on the first document?

A. Part with respect to that letter is what I told you; I am basing my knowledge and belief as to it having been received from the Edison Company upon several other circumstances, to my knowledge, that a copy was sent to the Edison Company asking questions which called for answers contained in the letter. Further, upon my call upon Mr. Cloos in New York, and he having discussed with me from time to time the fact they had received the questionnaire and they were working on it over in Orange, N. J., for the purpose of compiling answers to that, and later having seen, in finished form, the letter in the Commission's file.

All of those circumstances lead to my knowledge and belief that that is the letter that Mr. Cloos told me
19803 they were to send in response to the Commission's questionnaire.

Q. And because of those circumstances, Mr. MacIntyre, you formed the conclusion that this is the letter which the Edison Company sent to the Trade Commission?

A. They make up some of the basis for the conclusion I have stated, yes.

Q. Those are the bases for your conclusion or your belief that that is the letter that the Edison Company sent?

A. They form partial basis for my belief, yes.

Q. You have already told us you were not present when the questionnaire was dispatched at all, have you not?

A. No, I was not present when Mr. Anderson signed the questionnaire and had it posted.

Q. You have also told us, inferentially at least, you were not present when the Edison Company mailed their letter?

A. No, I was not present when they mailed their letter, of my knowledge.

Q. You told us that the first time you ever saw the letter was after it appeared in the Commission's files?

A. That is true.

Q. Now, as to Commission's Exhibits 3115-A to E, which you said was received from the National Company; is it not a fact that the first time you ever saw that letter was after it was already in the Commission's files?

A. After it had been received and properly filed in the Commission's files.

19804 Q. Yes.

A. That's correct.

Q. Is it not a fact that you base your testimony, or, rather, your conclusion that it is from the National Company from what you see on the face of the document?

A. No, again, I would go back to the correspondence that we had with the National Company in that respect.

You see, Mr. Leisure, in many—in practically all of these companies—we had subsequent correspondence with them which referred, for the most part, to their answers to these questionnaires that were mailed out in May.

Q. Have you offered those in evidence in this case?

A. No, all of them have not been. They merely refer to the fact that they had answered questionnaires that the Commission had sent out, and they contended—or made statements, I would say—in their future correspondence, or subsequent correspondence, to the effect that they felt they ought not to be asked any more questions, subsequent questions we were asking them about certain prices that they had established at their mills for truck deliveries.

Mr. Zimmerman: Now, I object, and move that that

portion of the answer be stricken out as to what was stated in the correspondence that has not been produced.

Trial Examiner Norwood: The objection is overruled.

19805 By Mr. Leisure:

Q. Now, to save time, Mr. MacIntyre, is it not a fact that this Commission's Exhibits 3115-A to E, which you testified was received from the National Company, that you based that testimony on having seen the letter in the files of the Federal Trade Commission and having seen it signed, or purporting to be signed, from someone from the National Company?

A. No, I believe we had subsequent correspondence with the National Company; that's my recollection.

Q. But you have not produced that correspondence here?

A. It is not marked for identification, I don't believe.

Q. No.

Now, is it not also a fact, without taking time to go through each one of these individually, Mr. MacIntyre, from Commission's Exhibits 3114 down to 3176,—or whatever the number is that you said was the correct number for this group of exhibits, that you base your testimony, the conclusion which you say—in which you state that it was received from certain companies—from the fact that you saw those letters in the files, and saw the purported signatures from the respective companies?

A. No, that is not all. That is not a statement of all the circumstances that applied, that gave rise to my knowledge and belief as to where they came from. We had, as I have told you, in practically—

19806 Q. Let me ask you—

A. (Resumed.) —in practically all cases subsequent correspondence during 1932 with practically all of these companies, and in that subsequent correspondence reference was made to the fact that we had this previous correspondence with them—

Mr. Zimmerman: Now, I object.

A. (Resumed.) —and which they had answered—

A. (Resumed.) —in which they had answered certain questions that the Commission had asked them, and the references in that case were to questions that had been contained in the letters that had gone out to them

19807 during May, 1931, in most cases.

By Mr. Leisure:

Q. In reply to Mr. Wooden's question as to this entire group, I understood you to tell him that you saw them immediately after they were received, and you saw them in the Commission's files—is that correct?

A. Saw them in the files.

Q. When you said "immediately," how soon do you mean by "immediately"?

A. Well—

Q. How many weeks?

A. It would vary, I couldn't say exactly how many days; in many cases it was the first day or two.

Q. Yes.

A. In some instances I saw the letters immediately upon the receipt stamp being placed on them in the Chief Examiner's office after their receipt. In other instances, I did not see the letter until it was filed in the Mail and File Department, after the receipt stamp had been placed on it.

Q. Is it not a fact with regard to all of these exhibits from 3114 down to 3176, that you were not personally present when any one of the companies wrote the letter or posted it?

A. That's true.

Q. Is that not true?

A. I was not present when they wrote it or posted it, no.

19808 Q. Yes.

Is it not equally true that you did not personally receive and open a single one of these letters?

A. That's true.

Mr. Leisure: That is all.

Trial Examiner Norwood: Who produced these papers out of the files? Who hunted them up in the files?

The Witness: I did. I took them from the files myself.

Trial Examiner Norwood: And these are the ones that you secured from the Commission's files; is that right?

The Witness: From the official files of the Commission.

Trial Examiner Norwood: All right.

Any further cross-examination?

Mr. Zimmerman: Are you finished, Mr. Leisure?

Mr. Leisure: Yes.

Mr. Wooden: I might say that there are a few addi-

tionals that belong in this group, Your Honor, that were inadvertently omitted in numbering, and we will have to go through the same process with them. Meanwhile, however, while Mr. MacIntyre is still on the stand—

1980 By Mr. Zimmerman:

Q. Mr. MacIntyre, when you referred to these documents as received and properly filed, you did not mean to inform us that you received them or that you filed them, did you?

Mr. Wooden: Your Honor, he is going over the same ground that Mr. Leisure went over.

Mr. Zimmerman: I am sorry, but I do not believe I am.

Trial Examiner Norwood: Let him answer that.

Mr. Zimmerman: I do not think I have.

Trial Examiner Norwood: Let him answer that question.

A. No, if you mean by that question—and I will have to ask you if this is the proper interpretation of the question—if you mean by that question that I actually tore open the envelope in which they came, and placed the receipt stamp on it, and actually bound it in the files, I would have to say no.

1981 By Mr. Zimmerman:

Q. Well, what, if anything, did you have to do with the actual receipt and the actual filing of the documents?

A. Well, after the documents were bound in these blue folders from which I have taken them this morning—

Q. That was the first time you had anything to do with it?

A. When?

Q. After they were bound?

A. After they were bound, upon their receipt in the offices of the Commission.

Q. Yes.

A. After they were bound and properly catalogued in the files.

Q. Well, after they were bound and catalogued.

A. And catalogued.

Q. Whether that was properly done or not, you do not know?

A. They were routed—they were routed over my desk,

as I came into the Commission's offices from field trips from time to time.

Q. Oh.

A. And the material in them was checked for the purpose of determination as to whether the answers propounded in the questionnaires had been sent out, had been fully answered.

Q. Now, as a matter of fact, you had nothing to do with their actual receipt,—that is so, is it not?

19811 A. In the manner that you have described.

Q. Yes.

A. I did not have.

Q. And you had nothing to do with the documents until after they had been filed and then—

A. Bound in the official files of the Commission. I didn't have anything to do with the documents prior to that time.

Mr. Zimmerman: All right. Thank you. That is all. Now, I do want to—well, that is all the examination I have on the part of—

Trial Examiner Norwood: Examine him.

Mr. Wooden: Nothing further on those particular exhibits, Your Honor.

Trial Examiner Norwood: All right. Go ahead.

Direct Examination by Mr. Wooden (Continued).

Q. Mr. MacIntyre, I am showing you papers marked for identification running from 3180-A to 3180-6-A, and ask you to state what you know about those papers (handing documents to witness)?

19812 A. These are papers which were selected by me from the files and records of the Consumers Company, Chicago, Ill. Their address is in the Conway Building, I believe it is 111 West Washington Street.

During December, 1938, I made a listing of the papers, after I had selected them from the files, placed them in an envelope—no, I placed bands around them and rolled them up, and asked that they be placed back in the records and held until I called for them.

On January 21, 1939, I called for the papers, and told them that I wanted them on behalf of the Federal Trade Commission, and they were submitted to me by the officials of the company at that time. I may state that I examined

—that the records and files from which I took the papers on the occasion of my first examination in December,
19813 1938, were files containing invoices, original invoices, which had been tendered to the Consumers Company of Chicago, according to the officials of the company, by various cement manufacturers from whom they had purchased Portland cement.

Q. (Indicating.) I am now showing you, Mr. MacIntyre, papers marked for identification as Commis-
19814 sion's Exhibits 3177-A to 3177-CCCC; what do you know about those papers?

A. They are part of the papers—that is, among the papers—that I selected from the Consumers Company's files in Chicago, under the circumstances and at the time that papers marked 3180-A to 6-A—

Q. (Indicating.) Now, I show you papers marked Commission's Exhibit 3178-A to 3178-X, inclusive; what do you know about those papers?

A. They were also among those papers that I selected from the invoice files of the Consumers Company, under the circumstances and at the time that I have stated that I selected those marked Commission's Exhibits 3180 and 3177.

Q. (Indicating.) Now, showing you papers marked Commission's Exhibits 3179-A to N, inclusive; what about those?

A. I will say the same thing with respect to those.

Mr. Wooden: Now, I will offer, Your Honor, those papers numbered Commission's Exhibits 3180-A to 6-A; 3177-A to 3177-CCCC; 3178-A to X; 3179-A to N (handing documents to Counsel).

Trial Examiner Norwood: Any objection?

Mr. Zimmerman: I said I wanted to ask a question.

Trial Examiner Norwood: Any objection to Counsel taking those exhibits to study over the week?

Mr. Wooden: They are nothing but invoices, Your Honor. They all fall into that one class as invoices.
19815 Trial Examiner Norwood: All right. Counsel may retain them.

Mr. Zimmerman: Let me ask the witness a question.

Trial Examiner Norwood: Yes.

Examination On Voir Dire by Mr. Zimmerman.

Q. You said that these were taken from files which, according to the officials of the Consumers Company, contained original invoices. That is all you know about whether they are originals or not?

A. Well, I can state this, Mr. Zimmerman—

Q. I mean, what you were told?

A. Well, I want to state the circumstances.

Q. Never mind that, answer the question, first.

A. No, that is not all that I know about them.

Q. You know something more besides what you were told, do you?

A. I believe so. I can explain it, I believe, if you will permit me.

Q. All right; go ahead.

A. The head of the Car Lot Department in the Consumers Company was the official to whom I was referred by, I believe, a vice-president. His name was Zippel, Z-i-p-p-e-l.

He stated that he had been informed that I had a request to make, and that I was to make it to him.

19816 Q. You understand, I am not asking you for your conversation at all; I am asking you only for what you know beyond what was told you.

A. I am going to tell you what I did, if you will permit me.

Q. I am not going to permit you if you give the conversation, if my objection will have any weight with the Examiner, because I have not asked for the conversation.

Mr. Wooden: He asked what was done.

Mr. Zimmerman: I did not ask what was done.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Can you answer that? Read the answer up to this time.

A. I can state what was done at that time and what that added to my knowledge, if it would be of any help.

Trial Examiner Norwood: Go ahead; do that.

Mr. Zimmerman: That is, outside of what was told or said.

A. After I made my request for an examination of these original invoices which had been submitted to the

Consumers Company by cement manufacturers, I was then escorted across the accounting room of the company by this head of the Car Lot Department, and a clerk, and was shown certain files which were represented to me as
19817 containing those invoices as records of the Consumers Company.

A. I then requested I be permitted to examine those original invoices that were on file in those particular filing cases.

19818 The clerk that was with me was then assigned to help me remove the invoices from the filing cases and put them on a desk nearby for my examination. I then examined them and I took from the files all of the car lot invoices that appeared on their face to relate to car lot shipments by rail by the Marquette Cement Company from its Oglesby and LaSalle plant to the Consumers Company during the month of October, 1938.

Those shipments that were made by the Medusa Portland Cement Company from its Dixon, Ill., plant in car lot by rail. Those that related to truck and rail shipments by the Universal-Atlas Company from its Buffington, Ind., plant to the Consumers Company, and those that related to car lot rail shipments by the Alpha Portland Cement Company from its LaSalle, Ill., plant to the Consumers Company; all during October, 1938, and I inquired as to whether there were any other files that related to or contained original invoices showing shipments of cement to the Consumers Company by cement manufacturers during October, 1938, and I was told they had no other such files or records except recapitulations in ledgers; that these were the records of original entry showing such shipments.

Mr. Zimmerman: I now object to all of the documents generally on the ground that their basis is purse hearsay, nothing else but.

19819 There is no showing that any Respondent was present at the time or had anything to do with this conversation or the identification of these documents; knew anything about it, at all.

The answers that have been permitted to my questions were not even remotely related to my question. The witness was encouraged to go ahead and tell conversations which I did not ask for, and I move that all the conversational matter be stricken.

Trial Examiner Norwood: Who encouraged?

Mr. Zimmerman: Well, as I understand, Your Honor did. That was my impression. You would say you were going to permit him to state that and go on, even though I did, from time to time, point out I was not asking for such a statement at all.

Trial Examiner Norwood: I don't think Counsel's statements are borne out by the facts. Objection overruled and motion denied.

Mr. Zimmerman: If Your Honor can point out wherein my statement is not borne out by the facts I will be glad to withdraw it.

Mr. Wooden: There is an offer pending on these exhibits.

Trial Examiner Norwood: As I understand it, do Counsel desire to retain those for study over the week; is that right?

Mr. Withrow: That is right.

19820 Trial Examiner Norwood: Go ahead.

Mr. Wooden: Will you mark these for identification?

(The documents referred to were thereupon marked for identification as Commission's Exhibits 3182-A to 3182-I, inclusive; 3183-A to 3183-K, inclusive; 3184-A to 3684-M, inclusive; 3185-A to 3185-O, inclusive; 3186-A to 3186-M, inclusive; 3187-A to 3187-H, inclusive.)

Mr. Wooden: These were the ones omitted in the numbering, before, of that same class.

Mr. Leisure: The same testimony applies, Mr. MacIntyre, to these Exhibits 3182-A to I; 3183-A to K; 3184-A to M; 3185-A to O; 3186-A to M; 3187-A to H; I mean by that, you did not personally receive these replies and you were not personally present when they were obtained, or when they were opened from the United States mail?

Mr. MacIntyre: No, I was not personally present. In other words—

Mr. Leisure: You got them from the files, as you told Mr. Wooden?

Mr. MacIntyre: I can only say, with respect to those, that I did in regard to the exhibits marked 3114 to 3176, inclusive.

Mr. Leisure: That is right, and you got these and

19821 the others, as you told Mr. Wooden, from the files?

Mr. MacIntyre: That is right.

Trial Examiner Norwood: The same testimony applies to these as to the others heretofore testified about?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: They are included in the offer and Counsel may take them for study.

By Mr. Wooden:

Q. Mr. MacIntyre, I am showing you Exhibits 415-22, 415-27, 415-28, 415-39, 415-49, 415-50, 415-40, 415-41, 415-321, 415-366, 415-367, 415-368, 415-373, 415-374, 415-545, 415-572, 415-573, 415-574.

What, if anything, did you have to do with the obtaining of those papers and, if so, if you had anything to do with it, state wherefrom.

Mr. Leisure: Are these exhibits, or did you leave off the identification, Mr. Wooden?

Mr. Wooden: They are exhibits.

Mr. Leisure: Are they in evidence?

Mr. Wooden: They are in evidence.

Mr. Leisure: I object to taking time to identify exhibits in the record that are already marked in evidence and asking the witness now what he knows about their identification.

I particularly object to it being done during the 19822 lunch period.

Trial Examiner Norwood: Can you dispose of this matter shortly?

Mr. Wooden: I don't think it will take two minutes.

Trial Examiner Norwood: Objection overruled. There have been objections to papers all the way through, hundreds of them, and if he wants to add more by way of identification, he has the privilege to do it.

Mr. Zimmerman: I don't think half-past one or two o'clock on a Saturday afternoon is the proper time to do it.

Trial Examiner Norwood: I do.

Go ahead.

A. These papers were selected by me from files—from what Mr. Brick, of Counsel for the Respondents, told me were files of The Cement Institute a little over a year ago.

It was stated by Mr. Brick and other Respondents' Counsel at that time that these were included in the packages of exhibits that were produced by The Cement In-

stitute under subpoena duces tecum but were carried back to their offices and were not given numbers in the hearing room.

I went over to the offices of Respondents' Counsel and Mr. Brick brought the packages out and permitted me to make an examination of them and from those papers in the packages I made selection of these papers and
19823 they were marked, as I selected them, by a man by the name of Feamster who went over there with me for the purpose of marking the papers as I selected them.

It is my recollection it was understood by Counsel for the Respondents at the time those papers were offered that those were the facts, but I don't believe the record as heretofore shown those facts on its face.

Mr. Wooden: That is all, Mr. MacIntyre.

(Witness excused.)

19824 Mr. Wooden: Yesterday, or the day before, I offered the North Carolina material numbered for identification from 3062-A to 3092-U, stating that photostats would be made of it and asking leave to substitute photostats.

The photostats are now here and I offer them along with the original data and ask leave to substitute the photostats for the original data and let the photostats be received in evidence.

(The documents referred to were marked for identification as Commission's Exhibits 3062-A to 3062-Z, inclusive; 3063-A to 3063-GG, inclusive; 3064-A to 3064-P, inclusive; 3065-A to 3065-Z, inclusive; 3066-A to 3066-S, inclusive; 3067-A to 3067-AA, inclusive; 3068-A to 3068-U, inclusive; 3069-A to 3069-GG, inclusive; 3070-A to 3070-R, inclusive; 3071-A to 3071-BB, inclusive; 3072-A to 3072-PP, inclusive; 3073-A to 3073-O, inclusive; 3074-A to 3074-L, inclusive; 3075-A to 3075-T, inclusive; 3076-A to 3076-G, inclusive; 3077-A to 3077-X, inclusive; 3078-A to 3078-V, inclusive; 3079-A to 3079-J, inclusive; 3080-A to 3080-L, inclusive; 3081-A to 3081-V, inclusive; 3082-A to 3082-M, inclusive; 3083-A to 3083-R, inclusive; 3084-A to 3084-KK, inclusive; 3085-A to 3085-F, inclusive, 3086-A to 3086-E, inclusive; 3087-A to 3087-I, inclusive; 3088-A to 3088-G, inclusive; 3089-A to 3089-F, inclusive; 3090-A to
19825 3090-H, inclusive; 3091-A to 3091-F, inclusive; 3092-A to 3092-U, inclusive.)

Mr. Leisure: We will, of course, have no objection to that procedure, Your Honor, that is, to having photostats in the record rather than the originals, as soon as we have had an opportunity to compare the photostats with the originals.

Trial Examiner Norwood: You are taking the originals and the photostats into your possession for study?

Mr. Leisure: Yes, sir; and, of course, we will, if we may, as to objections, state those at the time we state our other objections to the other exhibits, if that is satisfactory.

19826 Mr. Wooden: Your Honor, I am now going to offer a number of selections from the printed official transcript of the record in what is referred to as the Old Cement Case.

I am doing it on this basis, that some ten of the present Respondents were defendants in that case.

Mr. Zimmerman: Which ones?

Mr. Wooden: The Alpha, Coplay, Edison, Giant, Glenn Falls, Hercules, Lawrence, Lehigh, Nazareth, and Vulcanite, and my offer is going to be confined to documents to which present Respondents were parties—

Mr. Zimmerman: Were what, please,—parties? I did not hear?

Mr. Wooden: Were parties.

I refer to volume 1 of the transcript of record in the Supreme Court of the United States in that case against the Cement Manufacturers Protective Association, and others, and also pages 1 and 2 as they appear in that volume, as showing the names of the parties.

I will ask the Reporter to give that a number.

(The document referred to was marked for identification as Commission's Exhibit 3188-A and 3188-B.)

Mr. Wooden: I further offer certain portions from that official transcript, volume 1, indicated on pages 20, 45, and 46, and indicated thereon by red pencil brackets.

19827 I will ask the Reporter to give each of those pages a number.

Mr. Zimmerman: May I ask upon what theory this offer is made?

I think that is a pertinent inquiry, and a proper one, and may I have an answer to that?

Trial Examiner Norwood: Wait until he completes his offer there.

Mark that Commission's Exhibit 3189-A to D.

(The document referred to was marked for identification as Commission's Exhibit 3189-A, B, C, D.)

Mr. Wooden: To the page numbers that I previously gave, should be added page 109 of the printed volume 1.

I may say that those pages 20, 45, 46, and 109 are taken from the answer of the defendants in that case.

I also offer marked portions in red, indicated on pages 315, 316, and 324 of volume 1 of the official transcript, and will ask that they be given the next number by the Reporter.

Trial Examiner Norwood: Commission's Exhibit 3190-A, B, and C.

(The documents referred to were marked for identification as Commission's Exhibits 3190-A, B, C.)

Mr. Wooden: I also offer the marked portions similarly indicated on pages 432 and 438 of volume 1 of that
19828 printed transcript, and ask that they be given the next number.

Trial Examiner Norwood: Commission's Exhibit 3191-A and B.

(The papers referred to were marked for identification as Commission's Exhibits 3191-A and 3191-B.)

Mr. Wooden: I also offer from pages 484, 5, 6, and 7, of that same volume 1, of the printed official transcript, what was already numbered as Commission's Exhibit 2869-A to D, for identification.

From volume 2 of that printed transcript, I offer a pamphlet that is reproduced therein as Government's Exhibit 243, and published by the Portland Cement Association, containing a compilation of reports of the Trade Practice Committee, the personnel of which committee included representatives of Respondents Glenn Falls, Alpha, Santa Cruz, Giant, Missouri, Colorado, Vulcanite, Lehigh, Lawrence, Ash Grove, and Dewey Companies; that contains 20 printed pages, together with a series of forms referred to in the pamphlet.

I will ask that the pamphlet be given a number at this time.

Trial Examiner Norwood: Make that Commission's Exhibit 3192.

(The pamphlet referred to was marked for identi-
19829 fication as Commission's Exhibit 3192.)

Mr. Wooden: I also ask that there be numbered from that same volume two, of the official printed tran-

script, the report of the Committee on Trade Conditions. They are in evidence as Government's Exhibit 245, consisting of 17 numbered pages, and containing the personnel of the committee, including such men as B. F. Affleck and representatives of the Glenn Falls, Huron, Giant, Alpha, Lehigh, Coplay, Vulcanite, and Ash Grove Companies, Respondents in this case.

Trial Examiner Norwood: Mark that Commission's Exhibit 3193.

(The paper referred to was marked for identification as Commission's Exhibit 3193.)

Mr. Wooden: I would like to show the pages of the volume within which these pages appear, Exhibit 3192.

Trial Examiner Norwood: That is, the volume page number?

Mr. Wooden: That is the exhibit number,—our exhibit number.

That is Government's Exhibit 243, and it is printed in the volume between pages 664—I should say, at page 664.

I offer also a document from volume 2 of that official transcript which appeared in that case as Govern-
19830 ment's Exhibit No. 253, and which appears at page 668 of the printed volume.

Trial Examiner Norwood: What is that number?

The Reporter: Commission's Exhibit No. 3194.

(The document referred to was marked for identification as Commission's Exhibit 3194.)

(A document was thereupon marked for identification as Commission's Exhibit 3195.)

Mr. Wooden: I also offer as Commission's Exhibit No. 3195 what appeared on page 669 of the printed official transcript as Government's Exhibit No. 254.

Will you mark this for identification.

(Thereupon a document was marked for identification as Commission's Exhibit 3196.)

Mr. Wooden: I also offer from volume 2 of the printed transcript in the former case as Commission's Exhibit 3196, that portion of the printed transcript consisting of Government's Exhibit No. 554 to 550, inclusive, and running in the printed transcript from pages 725 to 776.

Will you mark these for identification.

(Thereupon documents were marked for identification as Commission's Exhibits 3197 and 3198-A and B.)

Mr. Wooden: I offer as Commission's Exhibits 3197

and 3198-A and B, what appears in the volume 2 of
19831 the printed official transcript in the former case, as Government's Exhibit 691 and Government's Exhibit 692, appearing on pages 972, 973, and 974 of the printed transcript.

Will you mark this for identification.

(Thereupon a document was marked for identification as Commission's Exhibit 3199.)

Mr. Wooden: I also offer from volume 2 of that printed transcript in the former case what appears on page 997 thereof, consisting of what was Government's Exhibit 697 and 698, in that case, as Commission's Exhibit 3199.

Will you mark this for identification.

(Thereupon a document was marked for identification as Commission's Exhibit 3200.)

Mr. Wooden: I offer what appears on page 998 of volume 2 of the printed transcript, what there appears was Government's Exhibits 746 and 747 in that record, and numbered for purposes of this case as Commission's Exhibit 3200.

Mr. Leisure: We will state our objections later when we have had an opportunity to look at these exhibits, Your Honor.

Trial Examiner Norwood: Yes.

Mr. Leisure: I can say now, however, that we do
19832 object to them as incompetent, irrelevant, and immaterial.

At this time we have the idea, and the opinion, from the offer, without checking it, that it is very apparently an attempt to re-try another case. Counsel is apparently dissatisfied with the decision in the Old Cement Case.

Of course, there is nothing new about that situation. Counsel on either side of a case when they lose always feel that the court is wrong; but, fortunately, we do have the Supreme Court of last resort where matters are finally decided, as that case was.

I suppose, to meet these contentions that Counsel has put forward here in these exhibits, our complete answer would be the opinion of the Supreme Court, at least it should be. Now, just why we should take time in this record to go back and re-try issues which have been tried and settled by the Supreme Court, I do not understand why it should be done, and I think it should not be received in evidence in this case.

Mr. Wooden: I am not seeking to re-try it, Your Honor. I am simply trying to produce some evidence of what the Respondents in this case were doing as of the time shown by the offers made.

Trial Examiner Norwood: Well, does this constitute admissions?

19833 Mr. Wooden: Yes.

Mr. Leisure: Well—

Mr. Zimmerman: Admissions of what? That would be pertinent to a cease and desist order as of 1939, please?

Mr. Leisure: Furthermore—

Mr. Wooden: Well, you will have to see that for yourself.

Trial Examiner Norwood: Gentlemen, I suggest that we are going to have a hearing week after next for this very purpose, and complete the proffer here.

Mr. Wooden: I have.

Trial Examiner Norwood: Counsel will study the exhibits and state objections in full.

Mr. Wooden: I have completed.

Mr. Zimmerman: No, I do not think it is proper. I think we ought to have now some statement as to why Counsel makes such an offer.

This idea of just bringing in these offers with no foundation, no apparent connection at all, and pitching them in our lap, I think is objectionable.

Trial Examiner Norwood Does Counsel desire to make a statement?

Mr. Wooden: I assume, as before, that there will be no question about the authenticity of these documents

19834 that I have had marked and offered.

Mr. Leisure: I do not know why they should be offered.

Mr. Zimmerman: Of course, that hasn't anything to do with my question. Counsel knows that. I am asking why they are offered at all.

Mr. Wooden: Your Honor, I may say this much, that in the old case evidence was received showing the activities of some of the defendants in that old case who are now Respondents here. That antedated by some years the date of the organization against which proceedings were brought.

Mr. Zimmerman: Yes.

Mr. Wooden: The Court obviously took the view which

is well recognized that you can run a thing back to the beginning, in a conspiracy case, and it does not matter what has happened between, you can trace the thing back in the form of evidence to its beginning, and this evidence in the former case is just as admissible as the so-called license agreements were in the former case, because those license agreements had admittedly passed out of existence some years before the Cement Protective Association was formed, yet they were received in evidence.

Trial Examiner Norwood: The evidence in the
19835 other suit between the same parties and the same issues?

Mr. Withrow: No.

Mr. Wooden: Your Honor, I pointed out at the beginning, I am offering these because ten of the Respondents in this proceeding were defendants in that case.

Trial Examiner Norwood: Yes.

Mr. Wooden: You will find—

Mr. Zimmerman: Well, Counsel knows much more—

Mr. Wooden: You will find that some one or more of every Respondent, every defendant, that is referred to in the proffers that I have made, is a Respondent—

Mr. Zimmerman: But Counsel overlooks, there was no similiarity between that proceeding and the proceeding here.

Here we are not engaged in a suit for a penalty. Here we are not engaged in a criminal case. Here we are engaged only in determining whether or not the Respondents are, through some agreement, engaged in practices against which the Trade Commission is asked to enter a cease and desist order.

Now, they cannot possibly go back to matters so old as that. It is not material whether the court was right or wrong, or whether a crime has been permitted, or whether a penalty could be collected or not, for some past action.

19836 The sole question now is, are these Respondents engaged in some unfair method of competition which a present cease and desist order may be entered against.

Mr. Wooden: And when did it begin—

Trial Examiner Norwood: Wait a moment, wait a moment.

I welcome discussion on this—

Mr. Zimmerman: Yes.

Trial Examiner Norwood: But let us not do it now.

We have these exhibits for study, and we can discuss this, and I will appreciate the discussion more after I have had an opportunity to read these pages that have been proffered here.

Mr. Zimmerman: All right.

Trial Examiner Norwood: Now, have you any more proffers to make?

Mr. Leisure: Your Honor please, can we get some idea from Mr. Wooden whether he is going to take all afternoon, because if it is, it is now ten minutes after two—

Trial Examiner Norwood: I think he is almost through.

Mr. Leisure: —and I would like to get some lunch.

Trial Examiner Norwood: I think Counsel is almost through.

19837 Mr. Wooden: I would like some lunch myself.

Mr. Zimmerman: Can you not tell us something about it?

Mr. Wooden: I think we are almost through.

Mr. Zimmerman: Does that mean 15 minutes, or half an hour, or what?

Mr. Wooden: Less, I hope.

Trial Examiner Norwood: Yes. Go ahead.

Mr. Leisure: All right.

Mr. Wooden: Your Honor, I have here now the papers which were produced under subpoena by the Dewey Portland Cement Company, and they were numbered for identification as 3093-A to 3093-O-14.

These are the original papers which I have here, and I am offering the original papers with the statement that the photostating has not been completed of them, and that if Respondents so desire they may substitute the photostats for the originals when that photostating is completed.

Trial Examiner Norwood: May the Respondents take those to look at?

Mr. Wooden: They looked at them long before I ever saw them.

19838 Mr. Wooden: I am now offering a paper marked for identification as Commission's Exhibits 3201-A
19839 and B, being both the front and reverse side of a quotation form, on the form of the Marquette Cement Manufacturing Company, and I am asking if Mr. Zimmerman will concede that that is an authentic paper, either now or after he has time to look at it and check on it.

(Mr. Zimmerman examines document.)

Mr. Zimmerman: Oh, go ahead with something else, if

you wish. Do not wait on me, because I will take a little time.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: I understand that this document is offered simply to show a form of quotation that was used by the Marquette Cement Manufacturing Company in the year 1929, which is the date it bears?

Mr. Wooden: That is right.

Mr. Zimmerman: I, of course, shall have no objection to the document so far as a form of a quotation for that year 1929 is concerned, though I do not concede,—in fact, I am quite sure that that form has not been used in a good many years, and I do not, therefore, see how it is at all pertinent to this case as to what form of quotation was used in 1929.

There are, on this document, a number of lead pencil marks. I don't know what they mean or who put them on there, and I assume they are not being offered.

19840 Mr. Wooden: I am not offering anything except the form and the date.

Mr. Zimmerman: Simply the printed form and the date of April 27, 1929.

Even so, I think I would like to have it compared by our office. I know nothing about the date on there.

Trial Examiner Norwood: Any objections to the exhibit?

Mr. Leisure: If we have any, we will state them.

Trial Examiner Norwood: I was going to receive that, in the absence of objection.

Mr. Zimmerman: Unless I notify you to the contrary, it is all right.

Mr. Wooden: May it be received subject to check?

Mr. Zimmerman: Yes.

(COM. EX. 3201-A, was offered and received in evidence.)

Mr. Zimmerman: Unless I can take this home and check it, I will not agree.

Trial Examiner Norwood: It is already in evidence.

Mr. Zimmerman: Well, may I take it home and check it?

Mr. MacIntyre: The Reporter can charge it out to

19841 him, I suppose.

Trial Examiner Norwood: I think so. Counsel may take it home and check it.

Mr. Zimmerman: How am I going to make the check?

Mr. Wooden: Take any information you want and check it there.

Washington, D. C.,
April 25, 1939.

19847 (COM. EX. 808-MM, 808-NN, 808-OO, and 808-PP,
19848 was offered and received in evidence.)

(COM. EX. 1277-A, 1277-B, 1277-C, 1277-D, and 1277-E was offered and received in evidence.)

Trial Examiner Norwood: Now at various times during this proceeding I have made rulings admitting evidence subject to its being connected on the whole record by some evidence of combination or conspiracy as alleged in the complaint.

My statements were intended as explanations that such evidence would not be considered against any particular Respondent until such Respondent had been shown
19849 by some evidence to be connected with the alleged activities. These statements, for the most part, were not intended as conditions to the receipt of these matters in evidence for unrestricted application where it could justly and lawfully be made. In order, however, to render this matter clear and definite so that the Respondents may be fully advised as to what evidence they will have to meet in presenting their case, I now rule that all such evidence is received unconditionally and subject only to the conditions attached by law to evidence of this character.

This ruling is based on the fact that there is some evidence in the record which, if taken to be true, would make a prima facie case of agreement or conspiracy, as alleged, against some if not all of these Respondents. The ruling is also based on the further grounds that a great part, if not all, of this material is part of the res gestae and as such might be considered unconditionally on any particular issue to which its relevancy is apparent.

All motions appearing in the record as having been made prior to this hearing and on which the rulings have been deferred and have not been made, are hereby denied:

Mr. Zimmerman: Well, if the Examiner please, there are some of those that I think you ought not to deny.
19850 for this reason: I have in mind a motion to strike certain testimony that ran through a considerable part of the record. The Examiner suggested that we specify the page and lines of the testimony, which we undertook

to do, and I assume that as to such matters of that kind we would have a reasonable time after the testimony is closed, or, say, at any time before we begin our defense or such time as you care to fix; I don't care to specify it.

Trial Examiner Norwood: I think on all motions of the nature that you have described there, except in the case of this mathematician—

Mr. Zimmerman: Well, I have one in mind now—

Trial Examiner Norwood: Yes.

Mr. Zimmerman: —Dr. Fetter, where there was a motion to strike out testimony because of its being based upon answers to hypothetical questions where he said he took into consideration other matter than that which was set forth in the question, and we were to specify.

Then there was one more recent than that.

Trial Examiner Norwood: I think I called those up and denied them, and I am making this ruling now, so that if there should be anything of that nature to be considered the Respondents would understand that they will have to bring it up.

19851 Mr. Zimmerman: Well, I do understand, then, that we may call your attention to those where we find that we have not specified the page.

Trial Examiner Norwood: Yes. If it appears that the Examiner has overlooked it, there, of course I should consider it at any time.

Mr. Zimmerman: Thank you very much. I just wanted to be clear. I did not think that you intended to foreclose us on that.

Trial Examiner Norwood: Yes.

Off the record.

(There was a short discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. Wooden: Your Honor, at our last session a number of responses by Respondents to questionnaire of the Commission were offered in evidence, and I believe that objections were made, and possibly some still pending,—at any rate, the offer is still pending.

At that time, we did not have available one of the Respondents' answers to that questionnaire, that of the Marquette Cement Manufacturing Company, and I would like to offer it at this time. It had been previously numbered as Commission's Exhibit 2610-A to C, for identification, and was identified by Mr. Wecker in Kansas City.

(Mr. Wooden hands documents to Mr. Zimmerman.)

19852 Mr. Zimmerman: At what page of the record is that?

Mr. Wooden: I am sorry, I do not have the page, Mr. Zimmerman.

Mr. Zimmerman: Well, I assume that I may have a chance to look up the record and see what its relevancy is.

Mr. Wooden: All right.

Mr. Zimmerman: Before I state my objections.

Mr. Wooden: Or we can find it for you and give it to you.

Mr. Zimmerman: Thank you very much. That is very kind of you.

Trial Examiner Norwood: Off the record.

(There was a short discussion off the record.)

Trial Examiner Norwood: All right, on the record.

(The Trial Examiner hands to the Reporter Commission's Exhibits 1277-A to E, inclusive.)

Trial Examiner Norwood: That has been received in evidence.

Anything further?

Mr. Wooden: One or two small matters.

Trial Examiner Norwood: All right.

Mr. Wooden: With regard to that Commission's Exhibit 2610-A to C, I may say that the only thing Mr. Wecker did was to identify his signature to the document.

19853 Mr. Zimmerman: All right, thank you. If I may just glance over it.

Mr. Wooden: Yes.

Mark this for identification.

(Thereupon, a document was marked "Commission's Exhibit 2921," for identification, being a substitute for a document previously so marked.)

Mr. Wooden: Commission's Exhibit 2921, for identification, is Dr. Fetter's book, "The Masquerade of Monopoly." That number was given to his personal copy, and I have another copy of the book here, which I will ask be given the same number and substituted for the one that was previously numbered Commission's Exhibit 2921.

In connection with the offer which I made of the book, I would now like to confine the offer to the following pages of the book, because they explain and bear upon the testi-

mony of Dr. Fetter given on cross-examination, and, according to Dr. Fetter's testimony, the whole book would be needed to make clear his position on various subjects that were gone into.

The pages of the book to which I direct particular attention, and to which I confine the offer at this time, are pages 235 to 242, and 243 to 350, inclusive.

Mr. Leisure: Now, if Your Honor please, we renew our objection to this offer,—those pages. Dr. Fetter
19854 was on the witness stand, and the book was marked for identification while he was on the witness stand, and I think, in point of fairness, we should have had the opportunity to cross-examine him on that portion of the book which Mr. Wooden offered, and I object to it being offered in this way at this time.

19855 Mr. Leisure: Now, there have been a great many threats and warnings that have been urged in this case against the Respondents, but I had no way of knowing when these particular threats and warnings that Mr. MacIntyre mentions,—that the pages to be selected would be pages 235 to 242. Neither did I know that the pages to be selected would be 243 to 350.

The only fair trial practice that I know of, and the one that is generally accepted and indulged in in this country, as far as my limited experience goes, is that when a witness is on the stand, if you want to offer in evidence something, you offer it while he is on the stand so that the other side has full and free opportunity to cross-examine, and I do not think that has been met with here, and I object to it in every way that I know of.

19856 Mr. Leisure: I would like to check that and see if is a new publication, whether it has been changed in any way, or whether it is the same book; but we object to it as it stands at the moment, as incompetent, irrelevant, and immaterial.

19857 Trial Examiner Norwood: The Counsel has the one that was originally proffered there, has he not?

Mr. Leisure: No, I haven't got the one that was proffered. Counsel for the Commission has that.

Mr. Wooden: That was Dr. Fetter's personal property. That was the only reason for the substitution.

As far as I know they are identical.

Mr. Leisure: They are different editions, aren't they?

Mr. Wooden: I don't know.

Mr. Leisure: I don't know whether there are any changes in the second edition, or not, Mr. Wooden.

Trial Examiner Norwood: I think if this is a different edition you will have to retain the same copy that Counsel examined him on.

Mr. Zimmerman: Certainly.

Mr. Wooden: It appears to be the same.

Mr. Brick: It wouldn't make much difference, your Honor, because we didn't cross-examine him on either of those pages that are offered.

Trial Examiner Norwood: Well, you could have cross-examined him on any part of that book you desired to cross-examine him on.

Mr. Wooden: You took five or six days in your 19858 examination.

The original 2921 says "First Edition".

The substitute doesn't say what it is, whether it is the first edition or not.

Trial Examiner Norwood: I think for the time being we will have to retain the original proffer. It will save time.

Mr. Wooden: Well, that is all right.

Might I inquire at this time whether any of the various papers and documents requested through Respondents' Counsel are available?

Mr. Leisure: What ones do you mean?

Mr. Wooden, it is a little difficult—

Mr. Wooden: Some of the recent ones; the Mallory material and—

Mr. Leisure: If you can—well you go back over a year and don't specify what you want. I don't know how to answer you.

Mr. Wooden: More recently, the Mallory material and the MacKelvey letter asked for and the O'Brien letter, and others do go back from time to time through the record.

I assumed that you took note of them at the time. They were specified on the record, at any rate.

Mr. Leisure: The Mallory material, is that one—

19859 Mr. Wooden: That's one of them that I refer to, yes.

Mr. Zimmerman: In regard to Commission's Exhibit 2610-A, B, and C, I should like the opportunity to consider that with the questions to which the letter seems to be a reply. It is not clear without the questions, as your Honor will see.

This simply refers to a question No. 1 and makes an answer, and No. 2, and so forth.

You will see, when we get down here, it says, "The answers to question 10 are applicable to this question."

I don't know what the questions are, and without the questions—

Trial Examiner Norwood: Yes; I think Counsel ought to clarify that.

Mr. MacIntyre: Respondents' Counsel have an exhibit offered Saturday, April 15, that have all of those questions set forth in it.

Mr. Zimmerman: What is that?

Trial Examiner Norwood: What number is it?

Mr. MacIntyre: It is 3181-A, B, and C, I believe is the number.

Mr. Withrow: 3181-A to C.

Mr. MacIntyre: It was tendered on April 15 for
19860 Mr. Zimmerman's and Mr. Leisure's study.

Mr. Zimmerman: Unfortunately it is still with Mr. Leisure.

I will just wait until that turns up, then.

Trial Examiner Norwood: What number did you say it was?

Mr. Withrow: 3181-A to C.

Trial Examiner Norwood: Is the Counsel ready to state his objections to other proffers?

Mr. Leisure: Mr. Wooden asked for some additional material from Mr. Mallory. I have that here.

I would like to have that marked for identification, if I may.

(Thereupon certain documents were marked Commission's Exhibits Nos. 3202, 3203-A, 3203-B, 3203-C, 3203-D, 3203-E, 3203-F, 3203-G, and 3203-H, for identification.)

Mr. Leisure: Here is another one, your Honor. I would like to have this marked for identification also.

Trial Examiner Norwood: Mark those the same way.

(Thereupon certain documents were marked Commission's Exhibits Nos. 3204, 3205-A, 3205-B, 3205-C, 3205-D, and 3205-E, for identification.)

Mr. Wooden: Was the McKelvy letter—

Mr. Leisure: I will come to that.

19861 I would like also to have marked for identification additional material which I am turning over to Mr. Wooden which comes from the files of the Alpha, which is the McKelvy letter, Mr. Wooden, and two other letters.

Mr. Wooden: The O'Brien letter?

Mr. Leisure: Yes. I would like to have those marked for identification.

(Thereupon certain letters were marked Commission's Exhibits Nos. 3206, 3207-A, 3207-B, and 3208, for identification.)

Mr. Wooden: Is there any other material, Mr. Leisure, that is available that comes within the general scope or category of requests made from time to time, without further specification at this time?

Mr. Leisure: I haven't attempted to sit down and read the whole record and find out what you have asked for, from time to time, Mr. Wooden.

You must have a list of the things you want and if you will specify them and we have them, we will give them to you.

I am not prepared to answer any other way.

Mr. Wooden: While I am on the point, Page 10500 of the record, a request was made of Mr. F. R. Johnson, I believe, while he was on the stand, at any rate, for

19862 the production of the letter from Mr. Bernhard Stroh and the reply referred to in Exhibit 100-B and on page 1039 of the record—

Mr. Leisure: Did you make that request of us, Mr. Wooden?

Mr. Wooden: I think so. It was while Mr. Johnson was on the stand.

Mr. Leisure: Then it was upon Mr. Johnson, I believe.

Mr. Wooden: Also a request was made on page 1039 for an auditor's statement of the Aetna Company. That was made while Mr. Johnson was on the stand, also.

Mr. Leisure: That was made while he was on the stand?

Mr. MacIntyre: As to that latter request it was made to both Mr. Johnson and Counsel and it was made because Mr. Johnson had made some representations while he was on the stand as to how much money he had lost during the depression years.

As the record stands now we have merely a guess on Mr. Johnson's part and no audited statement whatever and at the time the request was made as to some audit that would show what the facts are.

Trial Examiner Norwood: Does the Counsel contend that that is relevant; any of that line of testimony

19863 is relevant?

Mr. Wooden: Well, Mr. Johnson made those statements either on cross-examination—he made them on cross-examination, possibly he volunteered something like that also on direct, but it was not made relevant by any examination of the Commission's Counsel, as I recall, but since he went into it on redirect examination, I think that is where the request was made.

Trial Examiner Norwood: Go ahead.

Mr. Leisure: Our records indicate—at least, that is what our notes show, it was asked of Mr. Johnson and we have not made any effort, as Counsel, to get it.

If you want us, as Counsel, to try to get it, we will be glad to do so.

Mr. Wooden: Well, in that general connection, your Honor, I might observe that it is a well-settled principle of the law of evidence that when parties do not produce documents or papers that are within their power to produce the inference is to be taken that the papers, if produced, would be unfavorable to those parties.

Trial Examiner Norwood: In the absence of any showing on their part.

Mr. Leisure: That is new law to me. That is the first time I ever heard it enunciated.

19864 Mr. Wooden: You might read up on it.

Mr. Zimmerman: If you ask Counsel to produce the original of something and it is not done, then the door is opened so that you can offer secondary evidence.

Trial Examiner Norwood: That is the rule, but under certain circumstances, I don't say it applies here, the non-production of a paper would be the basis of an adverse inference.

Mr. Wooden: You find that in many decisions of the Courts, including the Supreme Court of the United States.

Trial Examiner Norwood: I don't say that it applies here.

Mr. Zimmerman: Nothing is impossible.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: As to Exhibit 2610-A to C, inclusive, if it is to be considered at all it should be considered as in connection with the questions which were propounded to or sent through the mails to the Marquette Company.

I find that Commission's Exhibit 3181-A is dated May 12, 1931, and is something written by the West Penn Cement Company.

The letter 2610-A says, "In compliance with your letter of February 15"; there is no showing, therefore, that
19865 there is any identity between the communication sent to the Marquette Company and that Exhibit 3181 which was sent some weeks later to the West Penn Company.

I object to the admission of 2610-A, B, and C, because there is not produced with it the questions to which 2610-A, B, and C, are in reply.

Second; because there is no showing that even with those questions it would be relevant or material to any issue.

It is very old; talks about what conditions were at the time of the letter, no doubt, and it does, in one part, make some reference to prices as existed January 1, 1929, some 10 years ago.

There is a further reason: I note that beginning at the bottom of page 2610-B this statement occurs:

"The information contained in the answers to questions 7 and 9 is of a highly confidential nature and we should dislike very much if this information should be published or if it should become available to the public in any manner."

"We would, therefore, appreciate very much your advice that this particular information furnished you will be treated as confidential."

I should think that there would have to be some very strong showing as to the importance of disclosing
19866 that confidential information before your Honor would entirely disregard that and I think that that should be an added reason why the other objection made should be sustained to the exhibit.

19867 Mr. MacIntyre: If Your Honor pleases, on that last point just raised by Mr. Zimmerman, let us not forget that on April 13, and April 15, 1939, the Commission sought to have placed in the record a tabulation that would show these production and capacity figures, and leave out of the record all of these original letters from these Respondents, not because there was any pledge of confidence on the part of the Commission that they would not be disclosed, but because it felt that it would like to, in so far as circumstances would permit it, avoid disclosing all of the information set forth in those letters; but Respondents' Counsel on those particular days, April 13 to April 15, 1939, saw fit to object to the tabulation, and

has, therefore, compelled the Commission, in order to get those facts into the record that it sought to put into the record through the tabulations, to now offer and to press for acceptance into evidence the full letters from the Respondents, and Mr. Zimmerman was one that so strenuously objected to a tabulation last Thursday and Friday.

Mr. Zimmerman: I do not think I have any reply to that. It is quite evident that the viewpoint of Counsel for the Commission is that the holy end justifies the nefarious means.

Trial Examiner Norwood: Is it clear, or is it in
19868 evidence,—is there anything in evidence to show what these questions are? That this Commission's Exhibit, for identification, 2610-A to C is a reply?

Mr. MacIntyre: This exhibit, which is the tabulation that you had there,—the record of April 15, 1939, is clear on the point that Commission's Exhibit, for identification, 3181-A to C, inclusive, is a form of a questionnaire that was sent to all of these cement manufacturers in the United States during the early part of 1931, and the questionnaire that went to the Marquette Cement Manufacturing Company during the first half of 1931, except for the address of the company, is the same as this Exhibit 3181-A to C.

Trial Examiner Norwood: Well, has that been shown?

Mr. Zimmerman: No.

Trial Examiner Norwood: Is that in evidence?

Mr. Zimmerman: No.

Mr. MacIntyre: The exhibit itself is not in evidence.

Mr. Leisure: Who was the questionnaire sent by, may I ask?

Mr. MacIntyre: It was sent by the Chief Examiner in response—I mean, pursuant to a United States Senate Investigation, that was being made under the Norris Resolution.

19869 Mr. Leisure: The Chief Examiner of the Federal Trade Commission?

Mr. MacIntyre: That is true.

Mr. Wooden: I would suggest, Your Honor, that the Marquette reply is competent and admissible, regardless of any relation to any questionnaire. They can produce, if they like the original questionnaire to which that was a reply, and there would be no objection to using it or receiving it in evidence; but regardless of that, as a docu-

ment itself, the written statement of the Marquette Company, the Respondent here, is competent.

Trial Examiner Norwood: If these statements are understandable by themselves—

Mr. Wooden: I think they are.

Trial Examiner Norwood: —and correct—I shall examine them and see.

Mr. Wooden: I think they are.

Mr. MacIntyre: And in furtherance of the statement just made by Mr. Wooden, if Your Honor please, Mr. Zimmerman's client, the Marquette Cement Manufacturing Company, has the original letter over the signature of the Chief Examiner of the Federal Trade Commission in which the questions were propounded to which this offer is an answer.

Mr. Zimmerman: I suggest that the testimony
19870 of Counsel be stricken from the record.

Trial Examiner Norwood: The Counsel's motion is denied on the grounds that it is not testimony.

Mr. Zimmerman: It could not be anything else. Is is a statement of fact, and he is still under oath, I suppose. He gets on the stand from time to time without being resworn, and testifies. I do not think it makes much difference whether he is standing down here or up there.

Mr. Wooden: I thought the stipulation was that his testimony regarding certain of these answers to questionnaires might be taken as applicable to all such questionnaires, and this is one of those.

Mr. Zimmerman: I would not know whether it was one of a series or not. There is no testimony in the record which proves that it is.

Trial Examiner Norwood: I do not think that Counsel's point is good as to this being a confidential communication, in the circumstances of this investigation.

Mr. Zimmerman: You mean that it is not a new point that I am raising?

Trial Examiner Norwood: We have received any information that they can get by proper means.

Mr. Zimmerman: Well, if they make a request of some individual, and the individual in good faith says:
19871 "Now, I will send this information to you in confidence," they should at that time have rejected it and said, "We will not so accept it in confidence, and we

will use such other legal methods as we may have to obtain it."

If they accept it with that understanding, one would suppose that under ordinary conditions that it would be tantamount to an understanding between the parties that it was accepted as tendered, and I should say that unless there is some very extraordinary showing made as to why that agreement should not be respected, I should rather think that the Commission itself would prefer not to go on record as obtaining information in that way and then later on repudiating it.

It is a different situation than from now stating for the first time that this should be treated confidentially.

Trial Examiner Norwood: Did the Commission agree?

Mr. Zimmerman: Sir?

Trial Examiner Norwood: Did the Commission agree to receive it as confidential?

Mr. Zimmerman: It was so tendered to them, and when they accepted it on that basis I say that they agreed to it.

Mr. MacIntyre: If Your Honor please, we take exception to that statement. Mr. Zimmerman has the
19872 letter that called for this information—

Trial Examiner Norwood: Yes.

Mr. Zimmerman: I take exception to that.

Mr. MacIntyre: —it should be clear—

Mr. Zimmerman: I take exception to that. No statement of that kind should be made.

19873 Trial Examiner Norwood: On the record.

Has Counsel any reply to that statement that he wants to make there?

Mr. MacIntyre: Your Honor please, I just wanted to point out that this Commission's Exhibit 2610-A, B, and C is a reply to a letter that was sent to Mr. Zimmerman's client, this Marquette Cement Manufacturing Company. If he thinks that he can show from the face of that questionnaire that was sent him, and to which this is a reply, that the Commission was asking for any confidential information, of course he is at liberty—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —and is perfectly able to make any such showing, we invite him to make such showing that he feels he is able to make.

Now, with respect to the confidential character of this

information, let us not forget that the Marquette Cement Manufacturing Company submitted such information to Mr. Mallory in The Cement Institute for a period of several years—

Mr. Zimmerman: Now, there isn't anything—

Mr. MacIntyre: And since this.

Mr. Zimmerman: There isn't any basis for that latter statement, either.

I do think that Counsel ought to be a little more
19874 circumspect about his statements of fact. If he desires to make some reference to a page of the record that he thinks is inconsistent with what has been said here, I would seriously not object to that, but it is a little impossible to conduct these things, make the orderly suggestions and replies, in reply to blanket statements that this is true and that is true.

Trial Examiner Norwood: I will explain that Counsel's statements are not taken as evidence—not considered as such by this Examiner, or the Commission, or anyone else, and they do not enter into the findings.

Now, as to this Commission's Exhibit 2610-A to C, I find that a good many of these statements here will stand alone, and it is my belief that there is sufficient in the evidence to show what are the questions to which some of these others are replies. Now, if that is not so, and any of these answers here appear to be incomplete, they will not be considered in making a finding on this thing:

Mr. Zimmerman: Well, excuse me, if any of the answers are to be considered at all, they should be considered as a whole.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: Now, I would object very strenuously; if the document goes into evidence at all it should be
19875 considered as a whole and not parts selected.

Trial Examiner Norwood: I think it is very clear that the same questionnaire was sent to all of these people, and it is in evidence more than once, and I overrule the objection and receive the exhibit as marked.

Counsel has his exception.

(COM. EX. 2610-A, 2610-B, and 2610-C, was offered and received in evidence.)

19886 (COM. EXS. 426-O, 426-P, 426-Q, 426-R, 542-A, 542-B, 550-B, 550-C, 550-L, 562-ZZZZZZZ,

562-AAAAAAAA, 562-BBBBBBBB, 562-CCCCCCCC, 562-DDDDDDDD, 562-LLLLLLLL, 562-MMMMMMMM, 562-XXXXXXXX, 562-YYYYYYYY, 695, 808-XX, 808-YY, 808-BBB, 808-CCC, 808-DDD, 808-FFF, 808-GGG, 808-III, 808-LLL, 808-MMM, 808-NNN, 808-OOO, 808-PPP, 808-QQQ, 808-XXX, 108-YYY, 808-ZZZ, 818-BBBB, 818-CCCC, 818-DDDD, 818-EEEE, 818-FFFF, 821-D, 821-E, 821-F, 821-G, 821-H, 821-I, 821-J, 821-M, 821-N, 821-YYY, 821-ZZZ, 826-OOO, 826-PPP, 844-D, 844-E, 844-F, 844-G, 844 H, and 2917-A, 2917-B, 2917-C, 2917-D, 2917,E, 2917-F, 2917-G, 2917-H, 2917-I, 2917-J, 2917-K, 2917-L, 2917-M, 2917-N, 2917-O, 2917-P, 2917-Q, 2917-R, 2917-S, 2917-T, were offered and received in evidence.)

19891 Mr. Leisure: The next group that we have classified together in one group, if the Examiner pleases, is the group numbered Commission's Exhibits 458-A to E; 737-AA to CC, and WW; 867-BBBBBBB, CCCCCCC, and YYYYYY.

This group of exhibits consists of documents turned over to the Federal Trade Commission pursuant to subpoena duces tecum served upon the Respondent Companies in February, 1938.

These documents, Your Honor, were offered in evidence and were rejected in Seattle, Wash., on June 28, 1938. They are these, the ones that I am about to specify—

Trial Examiner Norwood: Yes.

19892 Mr. Leisure: 458-A to E; 737-AA, and 867-YYYYYY; BBBBBBB and CCCCCCC.

The offer at that time—Counsel offered 458-AAAAAAAA. Since there is no exhibit of that number, I suppose he means that the record should show, and the correction should be made, to read as it is here;—458-A to E.

Your Honor will observe that these letters are written on the letterhead of the Southwestern Lumbermen's Association, a certain Mr. Woods is the author of many of these documents. I am referring to Exhibits 737-AA, BB. He identified some of them, but was not asked to identify the others. No witnesses ever identified the other documents, and no one has testified who could vouch for the truth or accuracy of the other documents in question.

Again, in this instance, the most that can be said, and all that can be said, is that they are documents which were produced under subpoena duces tecum. The exhibits

themselves are mainly letters written by this Southwestern Lumbermen's Association, together with answers by two of the Respondents to this Dealer Association, concerning matters in which dealer associations were at that time interested.

There is no showing that the Institute, or any Respondent other than the Respondent specified, named in the documents, ever saw the documents, or ever acted
19893 upon them. If they are received in evidence, therefore, we request that they be limited to the Respondents named. There is no offer of proof which would make these documents admissible, as being relevant or material to any of the issues raised by the complaint.

The documents, themselves, consist of statements made by officers of a dealer trade association, in the nature of puffing up the value of cooperation with dealer trade associations, to induce cement manufacturers to grant concessions in marketing policies to dealer members of such trade associations. The statements concerning the effects and activities of the Southwestern Lumbermen's Association are clearly hearsay.

For these reasons, and for the following specific reasons, we object to their being admitted in evidence in this case:

1: As being incompetent, irrelevant and immaterial.

2: Because they do not prove or tend to prove any of the issues named by the complaint.

3: Many of the documents were during the N.R.A. Code period, and the remaining documents are in the interim period immediately following the N.R.A. Code period.

4: All of these documents contain numerous
19894 hearsay statements which are inadmissible even on the theory of the admissions of co-conspirators, since they do not constitute admissions of fact at all.

5: These documents contain numerous expressions of opinion which the witnesses could not make if they were on the witness stand, and would not be binding on the Respondents in this case.

6: No attempt at segregation within the meaning of the rules of the Commission has been complied with. If they are offered as admissions of co-conspirators there is no reference to the Southwestern Lumbermen's Association, or any of its officers in the complaint as being co-conspirators in this case.

7: The statements contained in these documents are not such statements as would constitute admissions if made by co-conspirators named in the pleadings, in that they are not statements made in the course of any act in furtherance of the alleged conspiracy.

8: In addition, I would like to specifically object to Commission's Exhibits 458-D and E, and 737-CC, and 867-BBBBBBB on the ground that they are unsigned and unidentified documents.

For all of the above reasons we object to these documents and urge the Examiner to exclude them from the record in this case.

19895 Mr. MacIntyre: Your Honor please, these documents, as Mr. Leisure has just stated, were produced,—that is, most of them,—by Respondents in response to subpoenaes duces tecum served on the Respondents last year.

In addition to that, subsequent to your rulings admitting certain of those documents that were produced under subpoena at Seattle last June 28, we have had on the stand in Kansas City on January 20, 1939, as shown at page 14371, Mr. E. E. Woods, the non-respondent who is the author of a number of these letters, and he identified, at that time, his signature to the letters he wrote, as well as the signature of Mr. Scroggs, a one time president of his association, as being authentic signatures at the ends of letters which were in reply to certain other letters received from Respondents.

Now, of course, the letters that were submitted by the Respondents from their own files and as offered in that group are not original file letters because the Respondent had sent those letters on to Mr. Woods.

Furthermore, when we were in Kansas City, we attempted to obtain the original of those letters from Mr. Woods just as we had secured the carbon file copies from the Respondents under subpoena duces tecum. Mr. Woods stated they were no longer in his file; that he had recently cleaned out his file and he could not produce them

19896 the morning he came up to the hearing room, and as to the relevancy and materiality of these documents let us not forget that part that deals with and charges that the Respondents in this case have, through a combination of theirs, defined who shall and who shall not be considered as a recognized cement dealer or as a ce-

ment dealer, and in that connection let us not forget Mr. Woods' testimony, which begins on page 14371 during the course of which he defined what he believed to be a good and recognized dealer and what he believed to be a pirate in commerce as not meeting the requirements of a recognized dealer.

Now, Mr. Woods, as other evidence in this record shows, is the secretary of the Southwestern Lumbermen's Association. Other evidence shows that the Southwestern Lumbermen's Association is an affiliate and member of the National Retail Lumber Dealers' Association.

That the National Retail Lumber Dealers' Association is under the management of one Mr. Frank Carnahan, and Commission's Exhibits in series 202 and 1022 show clearly the cooperation of Mr. Frank Carnahan with Mr. George Reiter, the manager of The Cement Institute, during July and August, 1935, in attempting to channelize trade through certain dealer organizations.

Mr. Zimmerman: I just wanted to ask one ques-
19897 tion: Mr. MacIntyre, is the statement with reference to the matter of the originals of these letters not being in Mr. Woods' possession, is that of record? Is that something for the record or is that something you are telling us from your knowledge?

Mr. MacIntyre: I am merely telling you that now to show we have produced the very best of these documents we could obtain under subpoena from the Respondent, and by personal visit and request of Mr. Woods before he appeared on the stand in Kansas City in January of this year.

Mr. Zimmerman: As I understand the rules of evidence, in order to make a showing that would justify the production of some secondary evidence in lieu of the original, such matter as that should be brought out by proper evidence from a witness in the record and not by hearsay, but directly from the witness who knows, first-hand, the facts.

Mr. MacIntyre: On that point we don't feel it is necessary to produce the original here of these carbon file copies which the Respondent submitted in response to subpoena duces tecum. We feel that is equal to the very best documentary record of the contents contained in those particular exhibits.

Mr. Zimmerman: You see, you leave a link there
19898 that is not tight, at all, if you didn't have some

means of showing the connection between the supposed carbons and the supposed responses.

Mr. MacIntyre: When the subpoenas went out to these Respondents last year they didn't call for pigs, donkeys, or elephants; they called for documents in the form of communications between those Respondents and certain specified people.

The Respondents, in response thereto, brought in certain documents and wherever those documents were in the form of those file copies, purporting to be documents written by those people producing them, it most certainly seems they should not have produced them unless they were fully apprised that they were truthful and correct file carbon copies they sent out to third parties, or otherwise.

Mr. Leisure: As I understood Mr. MacIntyre's offer of proof as to why these documents are material or relevant in response to my objection, it was that these documents had to do with the plan or activities of the Respondents in saying who or what sort of concern should be a recognized dealer, and because of that fact he feels that they are material because it is raised in the pleadings.

I wish to state to Your Honor, that you will read
19899 these documents through from beginning to end
and you will not even find it remotely referred to in the documents as to what shall constitute a recognized dealer.

Let me give you one example; Commission's Exhibit 458-A: A man on the letterhead of the Southwestern Lumbermen's Association writes a letter to Mr. Blaine E. Smith, and he starts out by saying:

"I have read with a great deal of interest your article reprinted from Pit & Quarry."

Here is an unsolicited letter written by a man with the Southwestern Lumbermen's Association which is being seriously offered in a litigated matter as being binding on Respondents. I don't think anything further needs to be said in regard to that kind of a—

Mr. MacIntyre: No, we just—

Trial Examiner Norwood: I want to inquire from Counsel what reason was assigned there by this Examiner for rejecting these at Seattle—if that is the case?

Mr. Leisure: Your Honor didn't specify the exact reasons, but you did say it was part of a group you did not

feel should be received at that time, and I think by looking at them it is very apparent why you felt that way.

The letter I have just indicated is a typical example.

Trial Examiner Norwood: These papers, it just
19900 so happens that just yesterday I studied the testimony of this official of the Nebraska, or—I think both Nebraska and Kansas Lumber Associations.

Mr. Leisure: This is the Southwestern Lumbermen's Association.

Trial Examiner Norwood: I mean these retailers' associations.

Mr. Wooden: Runyan was the Nebraska man.

Trial Examiner Norwood: It was not clear to me, but it is clear to me now, inasmuch as these go right directly to the subject of their agreement in those Chicago meetings and their formulating these definitions of dealers.

Mr. Leisure: I have here before me an exhibit which we shall not be able to group. I will state my objections to that, briefly. It is Exhibit 564-YYY and ZZZ, and it purports to be minutes of a meeting dated September 4, 1936, of the Southern California Division of The
19901 Cement Institute.

Your Honor will recall that the record shows in Exhibit 638-AA, the Institute never authorized any such division, and the minutes of this meeting are merely the minutes of a group of manufacturers who met together for the purpose of organizing and requesting the Institute for division status under the Articles of Association of The Cement Institute.

In view of the fact that the Institute acted adversely on this request, the materiality and relevancy of this material does not appear. We therefore object to it on the following specific grounds:

First, it is incompetent, irrelevant, and immaterial. It does not prove or tend to prove any of the issues set out by the pleadings and no proper foundation of any kind has been laid for its introduction in evidence.

19902 Mr. Wooden: Your Honor, regardless of the point Mr. Leisure makes, which I do not concede, of course, the fact remains that these are minutes of a group of Respondent companies.

Trial Examiner Norwood: That shows officials of the Respondent companies in this meeting?

Mr. Wooden: Representatives of the California group of Respondent companies.

(COM. EX. Nos. 564-YYY and 564-ZZZ was offered and received in evidence.)

Mr. Leisure: The next group of exhibits is a large group that was sent in by the various companies in response to the questionnaire sent out by the Federal Trade Commission in 1931.

As Mr. Zimmerman has already pointed out the answers to these questionnaires, in many instances, were considered as confidential and the Respondents then, we contend,
had a right to rely upon the belief that matters sub-
19903 mitted in that way would not later be used against
them in a litigated matter.

As far as I know, if it is done in this case, it will be the first time the Federal Trade Commission has ever adopted that procedure.

The entire group of exhibits I now refer to, 1267; 3114-A to 3176-TT, inclusive; 3181-A to 3187-H, inclusive; these documents have all been produced here in this hearing room from the private files of the Federal Trade Commission which, if we were to ask for on our own motion, I am sure we would be met with the response that they constitute private and privileged files of the Federal Trade Commission.

Trial Examiner Norwood: I don't think that these are in the same category with those confidential reports of the
Commission's agents.

19905 Mr. Wooden: Your Honor, I think the record clearly shows that the reason these original documents were offered was because Respondents' Counsel insisted that Exhibits 4 and 5, which were a tabulation based upon these documents, could not be received without the production of the original documents and I do not conceive them to be confidential under such circumstances and for that reason the offer was made.

Mr. Leisure: I don't think Mr. Wooden intentionally misstates the position we take, but the result is a very flagrant misstatement of our position which I am sure
he will agree to.

19906 We have never, when tabulations have been offered asked or suggested that the supporting data be offered in evidence. We have always said, "Give us an

opportunity to see the supporting data." That was not done in this case.

19907 The next thing we heard about supporting data—we objected to the tabulations and said "Is the supporting data in the courtroom?" Then we objected to the tabulation until it was here.

The supporting data was never offered to us to look at and to say it is now being offered because of something we requested I do not think correctly states our position, at all.

Trial Examiner Norwood: Well, will the Counsel agree to the reception of the tabulation if he has an opportunity to check with this supporting data and finds it is correct?

Mr. Leisure: That, of course, puts me back in exactly the position I was in when the tabulation was offered. I can't say, possibly, what I might do after I see the documents and compare them with the tabulation. I would want that opportunity.

I have always asked, when tabulations were offered, to have the chance to see the supporting data.

Trial Examiner Norwood: I think the simplest way would be to receive these and with the Commission withdrawing them if the Counsel wishes to agree or if it appears for any other reason that the tabulation should be received.

Mr. Wooden: If that can be done without any 19908 delay or holding up of the resting of the case, I would have no objection, but, frankly, there has been so much difficulty over the matter of tabulations, even when supporting data has been proffered, that I just concluded we would take a short-cut on that and offer the material, as to which there could not be any question; the basic data, itself.

Trial Examiner Norwood: As to its identification, here, does Counsel contend that these documents have not been identified?

Mr. Leisure: They haven't been, Your Honor.

Trial Examiner Norwood: Identified as coming from the files of the Commission?

Mr. Leisure: That is all. They have just been identified by an attorney who said they came from the files of the Commission.

I don't know whether he is really in a position to testify to that without calling the filing clerk.

Trial Examiner Norwood: I understood Counsel said he secured them from the files himself.

Mr. Wooden: And, furthermore, he handled those documents at the time they were first received.

Mr. Leisure: Not all of them. He said he saw one or two stamped, or something to that effect.

Trial Examiner Norwood: Is there any other
19909 evidence that the Commission may find available to identify them further than they have been?

Mr. Leisure: I don't propose to get on that side of the case. I don't think they have been identified.

Mr. MacIntyre: I don't know how Mr. Leisure expects us to produce the copies from his clients. We produced the originals and they evidently retained the carbon file copies and are not available to us, but they are to Mr. Leisure.

Trial Examiner Norwood: These are statements of correspondence containing data in regard to the various things about which the Commission asked them, and I shall overrule the objection and receive them subject, however, to being withdrawn in case the concise and correct tabulation is received in evidence.

They are in evidence and Counsel for the Respondents and all the Counsel may examine them and check them.

They begin with Commission's Exhibit, for identification, 1267.

(COM. EXS. 1267-A to 1267-H, inclusive; 3114-A to 3114-G, inclusive; 3115-A to 3115-E, inclusive; 3116-A to 3116-D, inclusive; 3117-A to 3117-L, inclusive; 3118-A to
3118-BB, inclusive; 3119-A to 3119-D, inclusive;
19910 3120-A to 3120-D, inclusive; 3121-A to 3121-H, inclusive; 3122-A to 3122-C, inclusive; 3123-A to 3123-F, inclusive; 3124-A to 3124-F, inclusive; 3125-A to 3125-I, inclusive; 3126-A to 3126-I, inclusive; 3127-A to 3127-I, inclusive; 3128-A to 3128-L, inclusive; 3129-A to 3129-D, inclusive; 3130-A to 3130-F, inclusive; 3131-A to 3131-C, inclusive; 3132-A to 3132-F, inclusive; 3133-A to 3133-H, inclusive; 3134-A to 3134-K, inclusive; 3135-A to 3135-M, inclusive; 3136, 3137-A to 3137-D, inclusive; 3138-A to 3138-D, inclusive; 3139-A to 3139-I, inclusive; 3140-A to 3140-D, inclusive; 3141-A to 3141-L, inclusive; 3142-A to 3142-F, inclusive; 3143-A to 3143-O, inclusive; 3144-A to 3144-E, inclusive; 3145-A to 3145-E, inclusive; 3146-A to 3146-D, inclusive; 3147-A to 3147-E, inclusive;

3148-A to 3148-C, inclusive; 3149-A to 3149-F, inclusive; 3150-A to 3150-F, inclusive; 3151-A to 3151-D, inclusive; 3152-A to 3152-S, inclusive; 3153-A to 3153-E, inclusive; 3154, 3155-A to 3155-C, inclusive; 3156-A to 3156-C, inclusive; 3157-A to 3157-G, inclusive; 3158, 3159-A to 3159-F, inclusive; 3160-A to 3160-C, inclusive; 3161-A to 3161-C, inclusive; 3162-A to 3162-C, inclusive; 3163-A to 3163-D;

19911 3164-A to 3164-E, inclusive; 3165-A to 3165-D, inclusive; 3166-A to 3166-G, inclusive; 3167-A to 3167-I, inclusive; 3168-A to 3168-L, inclusive; 3169-A to 3169-G, inclusive; 3170-A to 3170-G, inclusive; 3171-A to 3171-D, inclusive; 3172-A to 3172-H, inclusive; 3173-A to 3173-D, inclusive; 3174-A to 3174-D, inclusive; 3175-A to 3175-D, inclusive; 3176-A to 3176-UU, inclusive; 3181-A to 3181-C, inclusive; 3182-A to 3182-I, inclusive; 3183-A to 3183-K, inclusive; 3184-A to 3184-M, inclusive; 3185-A to 3185-O, inclusive; 3186-A to 3186-M, inclusive; 3187-A to 3187-H, inclusive, were offered and received in evidence.)

19912 Mr. Leisure: Your Honor please, there was one exhibit turned over to us which belongs to that group which failed to get a number and I will ask it be marked now and the same objection apply to it that applies to the others.

Trial Examiner Norwood: Yes.

Mr. Leisure: It was turned over to us in that same group but for some reason there was a failure to get a number on it.

Trial Examiner Norwood: Where does it belong.

Mr. Withrow: It is a separate letter, Your Honor; it amplifies in regard to a previous questionnaire. It probably should have a separate number.

Mr. MacIntyre: I recall on Saturday, April 15, that this letter was included in the list and I thought, of course, it was numbered.

I didn't check all the numbers at the time.

Trial Examiner Norwood: It evidently belongs to the papers marked for identification—

Mr. MacIntyre: I am not certain it was included in the list of April 15, but it appears to be.

Trial Examiner Norwood: In the list marked 3121.

Here is something else that is not marked. What is that (handing document to Mr. MacIntyre)? Is that

19913 absolutely necessary to this?

Mr. MacIntyre: As I see it, these unmarked papers that do not carry any Reporter's marks need not be included in the list.

There is nothing in the record that attaches to them in the way of testimony or otherwise.

Trial Examiner Norwood: In other words, that hasn't been offered?

Mr. Leisure: The one I referred to was offered because it was in the group turned over to us and that is where we got it.

Mr. MacIntyre: The testimony of April 15 does not show this was included in the group.

Mr. Leisure: We want to offer it, then, because it corrects some figures in the group offered.

I am referring to the letter of May 3, 1932.

Mr. Zimmerman: From whom to whom?

Mr. Leisure: On the letterhead of the Castalia Portland Cement Company.

Trial Examiner Norwood: And it corrects—

Mr. Leisure: Signed by C. W. Salmond.

Trial Examiner Norwood: What does it correct, there?

Mr. Leisure: I think it should be marked as a Commission's Exhibit and go in with the others be
19914 cause it is part of them.

Trial Examiner Norwood: Mark it Commission's Exhibit 3121-G and receive it in evidence subject to the same objection and same ruling.

(COM. EX. NO. 3121-G was offered and received in evidence.)

19916 (COM. EXS. 458-A, 458-B, 458-C, 737-AA, 737-BB, 737-CC, 867-BBBBBBB, 867-CCCCCCC, and 867-YYYYYY, were offered and received in evidence.)

Trial Examiner Norwood: This group has information as to this business policy of selling through dealers. There is other information about that. I see no reason to distinguish between them. Considerable testimony has been received on this point since we left Seattle; I do not just recall why we passed it there, it might be on account of identification, or something of that nature.

19918 Trial Examiner Norwood: All right.

Do you have any further objections, Mr. Leisure, to the proffers?

Mr. Leisure: Yes, sir; I have.

If Your Honor pleases, with reference to a tabulation:

At one time certain tabulations were offered and we were told we could go to the original sources; for instance, to the War Department and check the original date against the tabulations.

In the instance I am going to mention we have traced it through the War Department to the Memphis office, and then back again here, and we find that the War Department says Mr. Wooden has those bids, and when we refer to the War Department they say they haven't got them, Mr. Wooden has them.

I wonder if we could clear that up and check those against the tabulation and get it clear before we
19919 close, Mr. Wooden?

Mr. Wooden: If you refer to four bids covering 130,000 barrels at Memphis, serial No. 034-442—

Mr. Leisure: That is correct, yes.

Mr. Wooden: —I had those, and I have had them, and I so informed Mr. Rice of the War Department the other day, and we stand ready to have them used in any way, here in the building.

Mr. Rice is not willing, apparently, we should let them go out of the building. But, aside from that, they apparently relate to an exhibit that was numbered for identification as 794, and which was on page 3544 of the record, February 16, 1938, and that exhibit was never offered in evidence. I don't know just why the need of checking it appears when the offer was not even made.

Mr. Leisure: Then I wonder if they could be returned to Mr. Rice so we could deal with Mr. Rice with respect to this?

Mr. Wooden: Any way you like, although I suggested that to Mr. Rice and he said, "You might as well keep them there and check them there, and then you are sure you will be done with them."

Mr. Leisure: Mr. Rice's answer to us was he can't give us any authority over them until you are through with them.

19920 Mr. Wooden: It took the written approval of the Secretary of War to let them come over here, and that is the reason for my reluctance to have them go out of my possession.

Mr. Leisure: Could you return them to Mr. Rice?

Mr. Wooden: Yes, I would be glad to do so. I offered to do that, and he said, "Wait until you are sure you are through with them."

Mr. MacIntyre: While we are on that point, may I observe the Respondent has asked a week off since last week to check certain pending offers. These bids which are now referred to relate to an exhibit that was marked for identification as Commission's Exhibit 794, and marked as 794 not because Mr. Wooden or any Commission's Counsel asked it to be so marked, but because Mr. Zimmerman wanted it so marked.

It has never been offered for the record. It was never brought into the courtroom at any request of Commission's Counsel. It seems, therefore, a checking of it at this time is, for some reason, part of the Respondents' defense in this case.

Trial Examiner Norwood: Counsel may use it for that, and now that we have ascertained their whereabouts, they are so advised. If you are going to keep them, you might give Counsel for the Respondents photostatic
19921 copies of them.

Go ahead.

Mr. Smith: Mr. Examiner, in that same connection with Mr. Rice, when he was on the stand, at record page 1631 to 1635, he was asked for the Huron bids on the Tygart River project, and the Huron bids on Fort Peck. He agreed to bring both of those in.

At the conclusion of the cross-examination I reserved the right to further cross-examine him when those were produced. They never have been produced. I should like to have that promise of the witness carried out.

Mr. Wooden: Tygart River and what else?

Mr. Smith: Fort Peck. You will find at pages 1633 to 1635 there was the abstract of bids of the letting of Tygart River at February 1, 1935; there was the Huron bids on Tygart River, and he produced the Fort Peck abstract as Exhibit 165, and a question was developed as to the precise nature of the Huron bid, whether it was a mill bid or a delivered bid, when there were reservations in it, and he promised to bring that bid in, and I assume I still have the right of cross-examination when those papers are produced. That was reserved and promised.

Mr. Leisure: The next group of exhibits, Your Honor, which we have classified in one group, and will state
19922 our objections to the entire group, is: Commission's Exhibits 1499, 1500, and 1501-A to C.

This group of exhibits consists of documents which

were turned over to the Federal Trade Commission Counsel by Harold S. Cree, formerly of the Aetna Portland Cement Company, from among the papers and files which he took from his office, and, as he has already testified, kept at his home.

The identification of these documents consists, in the testimony given by Mr. Cree while he was on the witness stand in Cleveland. I am now referring to pages 11537 to 11549 of the record. On this identification and showing the documents were offered in evidence by Counsel for the Commission at page 11541, and we stated certain objections to them at that time, and our objections were sustained by Your Honor at that time, at page 11549.

They are now being offered again. There has been no additional testimony or additional identification for the documents. We think all of the same reasons that applied at that time still apply to the objections now being made. We would like to restate at this time all of our objections originally made with the same force and effect as though again set forth in the record at this point, and we specifically object also that Commission's Exhibits 1499 19923 and Exhibits 1500 and 1501-A to C are incompetent, irrelevant, and immaterial. They are mere typewritten copies that have not been identified, or no basis for introduction in evidence has been laid in any way.

The witness testified that he surmised that they might have come from certain sources, but at no time did he state that he had any direct knowledge of the papers in question, and there is nothing on the face of the papers, themselves, to indicate who wrote them. There is nothing to show that the Institute, or any Respondent other than the Aetna Portland Cement Company ever saw copies of these documents, or that they ever acted on such documents.

I may say as to these documents, Your Honor, the ones we are objecting to now, and all of those we objected to this morning, and the ones we are about to take up, we intended to send those over this last week as fast as we had finished with them for Your Honor to see.

Trial Examiner Norwood: Yes.

Mr. Leisure: But we divided them up among so many different men that were still working on them last night, and we have not physically had the opportunity of taking them out of our possession, so I merely mention that as

explaining why we were not able to bring them to Your Honor before this.

19924 Trial Examiner Norwood: Well, I will have tonight to study some of those.

Mr. Leisure: I want to call Your Honor's attention Commission's Exhibit 1501-A to B, which Mr. Cree testified on at page 11541 of the record, that he believes was received from the Chicago office of the Institute.

(Handing documents to the Trial Examiner:) Your Honor will notice that this document is dated July 6, and is found in the 1933 file between a document dated June 17, 1933, and a document dated July 28, 1933.

In the same file is a document marked Commission's Exhibit 1845, for identification, dated July 27, 1933, which set forth the fact that the Chicago division of The Cement Institute will start operations on August 1, 1933. So that it appears from the record and the surrounding exhibits, in the same file marked Exhibit 1501-C, that the Chicago office of the Institute was not in operation at the time the Witness Cree testified he received the documents from it.

We wish further to object to the receipt in evidence of Commission's Exhibit 1501-C, which is merely a file cover marked "The Cement Institute," because it has no relevancy or materiality, because Mr. Cree did not keep this file personally, and was not aware of what documents were or were not filed there by others in the Aetna

19925 office.

On all of these grounds we object to those documents and ask that Your Honor exclude them from the record in this case.

Mr. Wooden: Unless I am badly mistaken, Mr. Cree testified it was his best belief that at least some of those exhibits came to him from the trustee,—the Institute trustee for the district. I think he mentioned Mr. Rooney in that connection.

Mr. Smith: His precise language, Mr. Wooden, was, "I imagine it might have come to me from Mr. Rooney," and I think I am quoting him quite exactly.

Mr. Withrow: He surmised that it might have.

Mr. Wooden: The file kept at any rate by one of the Respondent Companies. That is the testimony of the former sales manager of that Respondent Company.

Trial Examiner Norwood: Well, will Counsel give me the citations that you made then to the record there?

I will have to reserve the ruling on this until tomorrow morning. Give me the citations to the record there.

Mr. Leisure: Everything on the subject, I gave several different page numbers.

Trial Examiner Norwood: Yes.

Mr. Leisure: But everything on the subject appears between pages 11537 and 11549.

19926 Trial Examiner Norwood: All right.

Mr. Leisure: The objection was sustained on page 11549.

Trial Examiner Norwood: I will reserve the ruling on that until tomorrow.

19928 (COM. EXS. 1929 and 1930, were offered and received in evidence.

19939 (COM. EXS. 2380, 2381, 2382, 2383, and 2384 were offered and received in evidence.)

19954 Mr. Withrow: Our next group of exhibits consists of Commission's Exhibits 3100-A to EE, 3101-A to Y, inclusive.

These exhibits consist of correspondence together with enclosures between Counsel for the Commission and W. Z. Betts, purchasing agent for the State Highway and Public Works Commission of the State of North Carolina.

As Your Honor will recall, Mr. Betts was a witness in this proceeding in December, 1937, one of the first witnesses that we had.

I would like to direct Your Honor's attention to the fact that these exhibits are now being offered in evidence, although no witness at any time has testified to their identification, and there has been no one on the witness stand who has vouched for the truth or accuracy of any of the statements in question. The most that can be said is that these documents consist of correspondence together with enclosures to and from the Federal Trade Commission.

I would like, further, to point out to Your Honor that on December 3, 1937, Mr. Betts was a witness in this proceeding, at which time he testified concerning State Highway bids in North Carolina for 1936 and 1937. The purpose and purport of these two exhibits, 3100 and 3101, is to supplement that testimony without giving the

19955 Respondents an opportunity to cross-examine the witness.

We wish to object to the admission of these documents, because they are incompetent, irrelevant and immaterial;

there has been no offer of proof which would make these documents admissible as being relevant and material to any of the issues raised by the pleadings; there is no showing that any of the Respondents ever saw copies of these documents, or ever acted upon them in any way.

The documents do not prove or tend to prove any of the issues of the complaint. These documents contain many hearsay and opinion statements which the witness could not make on the witness stand.

I also want to object on the ground it is apparent from Exhibit 3100-C through F, inclusive, that it was specifically prepared for use in this proceeding. The admission of such documents in evidence would deprive the Respondents of the right of cross-examination. The authentication of many of these documents seems to be based by Commission's Counsel on the fact that there is a facsimile signature of W. Z. Betts on each page. We want to specifically object that the rubber stamp of a facsimile signature does not amount to identification at all, and to further point out that the law concerning the authentication of docu-
1995 ments by signature and seal is a matter specifically covered by statute which has to be fully complied with; these facsimile signatures do not comply with any such statutes.

For all of these reasons we object to the admission of these documents, and request that they not be admitted in evidence at this time.

Trial Examiner Norwood: Are you referring to these tabulations here?

Mr. Withrow: That is right.

Trial Examiner Norwood: 3101-C to—

Mr. Withrow: Well, the ones that are stamped, Your Honor, start at 3100-C, the end of that exhibit, and the Exhibit 3101—well—3101 does not have any stamp,—no attempt has been made to stamp any identification on those at all.

Trial Examiner Norwood: Now, those were tabulations that were offered and the supporting data proffered to the Respondents?

Mr. Wooden: No, Your Honor, if I am not mistaken, these are not bids. These are documents furnished by the State of North Carolina through Mr. Betts, and the whole question, as I presented the offer, was in the hopes that Respondents would concede that if Mr. Betts were

recalled he would identify these documents and testify to the effect shown there; but it seems that such
19957 hope is not to be entertained.

Mr. Withrow: We feel that offering them this way deprives us of our right of cross-examination on these documents, and we have not had an opportunity to check the original data, since we have never been shown it, as these documents were prepared, as I pointed out to Your Honor,—some of this material was specifically prepared for the purpose of being offered in this case.

Mr. Wooden: I do not know where—

Mr. Withrow: 3100-C to F was prepared pursuant to the telegram written by you, which is quoted in full by Mr. Betts in his letter of Exhibit 3100-A.

Mr. Wooden: I do not recall anything prepared especially.

Trial Examiner Norwood: Mr. Betts signed this letter of transmittal in which he included these documents which have his private stamp on.

Mr. Wooden: Technically, I cannot find any fault with the position taken; but it is extremely technical, I will say that.

Trial Examiner Norwood: Well, I think, then, under the circumstances, we cannot receive these in evidence. Counsel may take them and see if he can meet the objections of Counsel.

(The Trial Examiner hands documents to Mr. Wooden.)

19958 Mr. Wooden: I might say as to Commission's Exhibits 3101-C to F, that I do have the originals of which those are photostats, if that will serve any purpose in checking.

Mr. Withrow: Your Honor, those are only the original tabulations, and not, of course, the basic data from which those tabulations were prepared that Mr. Wooden is now turning over to us.

Mr. Wooden: You have all—

Trial Examiner Norwood: Well, do you propose to submit the basic data?

Mr. Wooden: They have all the basic data that I am aware of in connection with these matters.

Trial Examiner Norwood: I see.

Mr. MacIntyre: It is my recollection that Respondents' Counsel had the basic data from the State of North

Carolina in the form of bids and which are under Commission's exhibit numbers, for identification, since last Friday — that is, Friday a week, I mean, 10 days now.

19959 Trial Examiner Norwood: Have they had them since you proffered these tabulations?

Mr. MacIntyre: For 10 days.

Mr. Wooden: They have everything we have or have had with this exception, here (indicating documents).

Mr. Withrow: The original bids are not the basic data for these tabulations now being offered so any statement by Counsel for the Commission that we have had everything they have had is a bit misleading.

We may have had everything that the Counsel for the Commission says; I won't dispute that, but—

Trial Examiner Norwood: Can you take the basic data—

Mr. Wooden: This, Your Honor, (indicating documents) consists of some additional record information from the files of the North Carolina Highway Commission. It is related to but, nevertheless, separate from the bids of 1936 and 1937 but it relates to it.

As I say, I can't quarrel with the technical correctness of the position and objections made.

Trial Examiner Norwood: Well, would you consider that if you get this witness back here and cross-examine him on it that that would be sufficient to meet your objection?

Mr. Leisure: That is not for us to determine,

19960 what Counsel should do.

The real fact is, Your Honor, that on Mr. White's charts there were certain mistakes made. Now they are trying to offer certain exhibits to cure those mistakes so that they can use them later.

As far as I know there may be as many mistakes in these tabulations as in Mr. White's chart and I am not going to waive anything until I look at the basic data.

If Counsel doesn't care to submit the basic data we will simply rely on our objections.

Mr. Wooden: You have all the basic data we have in our possession.

Mr. Leisure: That is not my fault.

Mr. Wooden: And this is not for the purpose of mak-

ing corrections in any of Mr. White's tabulations; it is to supplement the showing made.

Mr. Zimmerman: May I ask if these tabulations are based upon basic data you have in your possession or available to you?

Mr. Wooden: We do not have any basic data except this material itself and that was furnished by the State of North Carolina.

Any other basic material than this is in the possession of the State of North Carolina but this is basic material, as I understand.

19961 Mr. Zimmerman: Did you ever have anything more basic than that?

Mr. Wooden: No.

Mr. Zimmerman: Well, the fact is, as I understand, then, some employee down there in North Carolina made up some stuff and sent it to you and retained the basic data down there and never exhibited it to you?

Mr. Wooden: Most of it is basic data.

Mr. Zimmerman: By "basic data" we mean original.

Mr. Wooden: That is right; original; not made up at our request at all.

Mr. Leisure: I think that this record should be clear that the material Mr. Wooden referred to as basic data is nothing on earth except tabulations of invoices, which is not my theory of basic data.

Mr. Zimmerman: Certainly it is not original if it is a tabulation of the original.

Trial Examiner Norwood: Counsel may consider what can be done about that.

Mr. Withrow: The next objection, Your Honor, is to Commission's Exhibit 3102.

This exhibit purports to be a tabulation of bids on cement made for maintenance work for the State Highway Department of Missouri.

19962 We object to the receipt of this document in evidence on the grounds it is incompetent, irrelevant, and immaterial.

It does not prove or tend to prove any of the issues in the case, and on the further grounds it is grossly misleading and does not correctly summarize the bids and supporting material.

For example, the Missouri Portland Cement Company is listed as having three addresses indicating, perhaps, it

has three shipping points; listing the addresses of two plants and one sales offices while all the material and bids are prepared—that is, all the material and bids contained in the supporting data are prepared on the letterhead of the Missouri Portand Cement Company at Kansas City, Missouri, so that the person tabulating the information from this exhibit 3102 has made a selection of points under which the bids are to be tabulated going outside of the basic data.

The same applies to the Universal-Atlas Cement Company where two plants are listed—

Trial Examiner Norwood: How do they go outside the basic data?

Mr. Withrow: All bids were made from the Kansas City office and in the caption "Missouri Portland Cement
19963 Company, Sugar Creek; Missouri Portland Cement Company, St. Louis" and "Missouri Portland Cement Company, Kansas City" and there is nothing in the basic data indicating that there was any such division whatsoever.

The same applies to the Universal-Atlas Cement Company where two plants are listed while all bids were made from the Kansas City sales office, while the bids are tabulated under the mills with the lowest freight rate, thereby indicating that the person making the tabulation has gone outside of the matter contained in the supporting data.

In addition, bids were received as 7 destinations not listed on the tabulation. Those bids were requested for the following destinations:

Campbell, Cabool, Carthage, Brookfield, Everton, Denton, and Springfield.

With reference to the caption "Date of Opening," it should be noted that in many instances there was no opening of bids since the State of Missouri merely wired a request to one or more companies for a quotation on cement and the date listed in that column represents the date when the return wires were received from the companies, there being no opening of bids.

In the column indicating the type of packages, there are
19964 listed places for cloth and paper although many prices were quoted in bulk as well as in cloth and paper. It also should be noted that all paper prices have been omitted except where paper prices appear in

the file entitled "Cement Information Letting File", which is Exhibit 2450, for identification.

In other words, in making up this tabulation the prices in are contained in the other supporting material have been ignored.

The face of the tabulation would indicate that requests have been made for cement in both paper and cloth sacks, although bids were only occasionally received in paper sacks. It should be noted that cement was never purchased during this period, according to the basic data, by the State of Missouri in paper sacks. Purchases always being made in cloth sacks.

For further errors, under the destination New Haven, the bid of the Missouri Portland Cement Company for June 25, 1937, is listed under the column of the Lone Star Company. Lone Star did not bid at that destination.

The Missouri Company bid at Mountain View on December 12, 1935, and this bid is not included.

The Universal-Atlas bid at Bethany on July 28, 1937, and this bid is not tabulated.

There are errors in the quantities indicated here.
1965 For example, the quantity at Otterville should be 105 barrels and not 100 barrels.

This reference to errors on the face of the exhibit is not intended to be all-inclusive, but only a sample of the type of errors which exist within the body of the exhibit itself.

There was no reference on the face of the tabulation to such provision in the invitations to bid as a preference given by statute to Missouri manufacturers nor to such variations in terms and conditions of sale as different lengths of time for withdrawal of bids, for acceptance of bids, for commencement of cash discount, for shipping dates, and things of that type.

The entire face of the tabulation would tend to infer that each manufacturer listed in the heading received an invitation to bid at each of the destinations in question. This is not a fact, for in most cases only two or three manufacturers received an invitation to bid and in many of these cases all the manufacturers who received an invitation to bid did, in fact, bid. Some companies bid every time they received an invitation; thus the Lehigh Company received 10 invitations and submitted a bid on each of these 10 invitations:

Trial Examiner Norwood: Does this purport to show all the bids or does this purport to show the invitations?

19966 Mr. Withrow: I don't know what it purports to show, Your Honor, other than the caption.

Trial Examiner Norwood: Have you found where it has shown identical bids received here that this is incorrect?

Mr. Withrow: I have pointed to instances where companies have bid, the bids not being listed; to instances where the company's bids have been indicated in the wrong column; two instances where companies' bids have been omitted and to varying terms and conditions of sale and delivery which all affect the price which we contend should be included in order to make it, in fact, a tabulation of bids.

To continue with our objection:

"The Consolidated Company received one invitation to bid and did bid on that one invitation although from the face of the document one might get the impression that they received an invitation to bid at all of these various destinations and only saw fit to bid once.

19968 Mr. Wooden: Haven't we a stipulation to the effect that tabulations of bids or abstracts of bids might be received provided the basic data is proffered at the time for checking?

Mr. Leisure: I don't think the stipulation had anything to do with bids.

19969 I think there was a stipulation at the beginning of the case either side might offer a tabulation if the basic material was made available to the other side and we went around to various Government departments all over the City, here, checking up because of the fact we entered into that unfortunate stipulation.

I think basic material should be brought into the Court room.

We have never stipulated anything specifically about bids.

As to these bids, if this tabulation is made correct after we have had access to the bids, then, under our stipulation, we could agree to it, but we can't agree, ever, to an incorrect tabulation. We have pointed out the many ways in which this tabulation is not correct.

Trial Examiner Norwood: You have pointed out how

certain omissions and, I recall, one figure, there, as to the number of barrels—.

Mr. Withrow: I pointed out errors, Your Honor, in the bids of the Missouri Company, the Lone Star Company, the Universal-Atlas Company at certain destinations, but if you will bear with me until I complete my objection, there are some other points I would like to bring out.

Trial Examiner Norwood: Go ahead.

19970 Mr. Withrow: The tabulation does not show which companies received the awards. The supporting material itself does show this information and to be a complete tabulation it would be material that this exhibit show this information and to be complete according to its caption.

The supporting material itself is deficient in that there are many sheets of paper indicating that the material affecting cement bids and lettings have been removed from the files.

Thus, there are the following:

1. Twenty-two cross-reference sheets indicating such material has been removed from the file.

2. No copy of invitation to bid at 21 points although there is an indication such invitations were sent.

3. There is no information on awards at 96 points and there being information about the others, the inference is that this information has been removed from the files.

4. A substantial part of the exhibit is in connection with bids of High Early Strength Cement, which is not a part of this case, and, properly, should be eliminated.

5. The supportng material does not show all of
19971 the bids received at the several destinations but only part of the bids.

For all these inaccuracies and, also, on the legal objections which we have made, and we believe that there are other inaccuracies, if Your Honor wants us to take further time to study and to further point them out; for all these reasons we object to the receipt of this document in evidence as being incompetent and incorrectly stating the supporting data and not being a correct statement of what it purports to show according to the caption contained on Exhibit 3102.

19972 Mr. MacIntyre: Your Honor please, there has been an attempt made in the formulation of this

tabulation to set forth the prices that these various
19973 cement companies submitted to the State of Missouri, during the period shown on the face of the tabulation, and also to show what the cash discount was that applied with respect to those quotations or bids, and the allowances per sack, cloth sack, that was returned.

There has been considerable pain and considerable time and effort expended in the preparation of that tabulation by certain members of the Commission's staff. It is true that a number of the bids, the basic data which the Respondents' Counsel have been checking and re-checking for the past 10 days do contain bids on high early strength cement as contrasted with standard Portland cement. However, the tabulation, Exhibit 3102, carries no price on high early strength cement; it is all standard, the regular, so to speak.

As to the objection that was raised that some one may infer that some of these companies under whose name no price appears received an invitation and did not bid, there is nothing on the face of this tabulation that we submit would give rise to such an inference. There has been nothing said to the effect that it could fairly be appraised as giving the basis for such an inference, or in connection with the offer of this tabulation. As I say, there has been considerable time and effort expended in an effort to
19974 cut down this record on this offer of the Missouri bid.

However, since Counsel for the Respondents do not desire that it be cut down to that degree, we have no alternative other than to turn back to an official tabulation of the State of Missouri. It is somewhat more bulky than the one that we offered, and if there are any inaccuracies in it, it is an inaccurate State of Missouri official document, and it was identified by Witness Reagel on January 16, 1939, at Kansas City as the official document tabulating the bids that had been received over this period, and upon which the State of Missouri acted when it purchased cement pursuant to the bids received.

It is document 2450, marked for identification as Commission's Exhibit 2450, and the identification of that begins on page 13781 and following. The Commission's copy—

Trial Examiner Norwood: What page is that, please?

Mr. MacIntyre: 13781.

The Respondents' Counsel has had this Exhibit 2450 to check along with the basic data for 10 days now, also in connection with their study of document marked for identification as Commission's Exhibit 3102.

In the light of those circumstances, we now offer in evi-
dence photostatic reproductions of the bound vol-
19975 ume of tabulations which was at that time, and at
that place, marked Commission's Exhibit, for iden-
tification, 2450, as a tabulation of the bids, under the stipulation that was referred to a few moments ago by Mr. Leisure as having been running since the beginning of this case.

19977 Trial Examiner Norwood: I understand that Counsel for the Respondents takes the position that because they find one or two errors in a paper that that makes it inadmissible in evidence.

Mr. Leisure: I certainly do.

Trial Examiner Norwood: I do not agree—

Mr. Leisure: If there are errors, I do not think it ought to be admitted with errors, even if there is one error.

Trial Examiner Norwood: You can make mighty few things without some flaw being found.

Mr. Leisure: It is not under our stipulation if it
19978 is erroneous. I want that very clearly understood.

Trial Examiner Norwood: Well, I was just getting up to that.

I cannot follow Counsel in that, because you can make mighty few documents where you cannot find something in them upon which to base an objection, and a great many of the Respondents' objections to these papers are of that nature; it appears to me.

We have a right to receive these tabulations in evidence regardless of the objections of the Respondents. It is the practice in the Interstate Commerce Commission, and a great many governmental bodies, to receive those things provided that the supporting data is furnished the opposite side, so that they may come in, in putting in their case, and show the errors in the tabulations.

Mr. Leisure: Your Honor pleases, I fail to see any purpose whatever in spending days and nights in examining supporting data if the tabulations are going in with errors any way. The only purpose of having the supporting data, as far as I know, is to correct the errors.

Trial Examiner Norwood: No, the purpose of having

the supporting data is to enable the Respondents to detect any errors; to show that they are erroneous in putting in their side of the case.

Mr. Leisure: Well, when we are checking a
19979 document, when it is being offered by the other side, I fail to understand how we are putting in our side of the case, when we are checking.

Trial Examiner Norwood: Well, they are asking you to check in order to see whether you are willing to let the document in by agreement, in order to save the record, in order to save the masses of documents being received; consequently, the Respondent has been checking them and agreeing to their receipt, and I say now that their agreement is not necessary.

Mr. Leisure: Well, we still object to any and all documents that have errors in them, and those that have been pointed out, particularly.

Trial Examiner Norwood: Do you wish to take the proffer there and make your objections to it? He has proffered now Commission's Exhibit 2450, consisting of how many pages there?

Mr. MacIntyre: I would like for the Reporter to number the pages in there this afternoon, and to have the record show before the close of the day, when the hearing is closed today, what the number of pages is in the document, and they may then send it to Respondents' Counsel this evening for their further checking of it.

Mr. Withrow: Of course Your Honor will notice from the bulk of those papers it would be impossible to
19980 check those this evening, finish the checking of them.

Trial Examiner Norwood: Well, I think if Counsel can agree on it, it may be done; but, if not, and Counsel for the Commission insists, I will take them in now, and you can furnish the supporting data.

It does not appear that anything can be presented here that there will not be some objection to it.

Mr. MacIntyre: We were hopeful that an agreement could be reached so that Exhibit 3102 could be received with approval of Counsel for the Respondents, but many objections were made, as have been noted, to the fact that all the bids were not reproduced in toto on the back of this particular tabulation, or something of the sort.

Of course, if we are going to reproduce all of the bids,

setting forth in full all of the printed matter with respect to all of these terms and conditions of sale, the bids, themselves, would just as well be in evidence, with all of the bulk of data.

Mr. Leisure: Then change your caption. Either put them all in or change the caption. I think it would be much easier to change the caption.

Mr. MacIntyre: Witness Reagel on January 16 was asked what he considered to be a fair caption for his tabulation, and he stated what he considered would be fair, and he is the man that handled the bids; he is the
19981 man who has operated for the State of Missouri in the handling of the bids and the making of awards, and if he does not know I do not know that anybody would know what a fair caption would be.

Mr. Withrow: Did he make the tabulation?

Mr. MacIntyre: He did not make 3102.

Mr. Withrow: I think it might be a bit difficult for someone to dictate in advance what a fair caption for tabulation would be until he saw what had been put in the body of the tabulation, Mr. MacIntyre.

Mr. MacIntyre: As I see it, it is not necessary for us to make space in this expensive record—.

Trial Examiner Norwood: Does Counsel want to change the caption to meet the requirements of the Respondents?

Mr. MacIntyre: No; 3102 is withdrawn, the offer on it is withdrawn.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: We press now the offer for acceptance of Commission's Exhibit 2450.

Trial Examiner Norwood: Well, I think there is nothing to consider in regard to that except the identification, and I shall have to look at the record on that.

Mr. MacIntyre: It was identified at the page I gave you, that is 13781 and following.

Mr. Withrow: Your Honor, we would like to have
19982 an opportunity to examine 2450 before you rule upon it. In checking over the matter we find that that was not complete according to the other supporting material, and I feel sure we are going to have some objections on that ground to that exhibit, and I would like to have an opportunity to state those objections to you.

Trial Examiner Norwood: Do you think you can check that overnight?

Mr. Withrow: I don't know. It is not only that big exhibit, but all the others. We will do the best we can.

Mr. MacIntyre: We offer 2450 to show as many bids as it shows, and if it is not complete enough to show all the bids that the State of Missouri ever received from all the Respondents in this country, we can't help that, but we offer that for what it does show, and the Respondents in this case may offer any other bids or tabulations they can secure from the State of Missouri on other bids.

Trial Examiner Norwood: I think so.

Mr. MacIntyre: In the preparation of their case. We don't want to foreclose them on that. They have an ample opportunity to do so.

Mr. Withrow: Commission's Exhibit, for identification, 2450 consists of documents prepared by the State of Missouri and not by these Respondents; hence, they are 19983 in the nature of tabulations and we should have a right to examine the basic material, and that was what we were requesting, and we will do that as fast as we can and report as soon as we can, but we should have an opportunity to examine the basic material.

Trial Examiner Norwood: I agree with Counsel on that. I will reserve ruling on that.

Are you taking the basic data as the further supporting data on that?

Mr. MacIntyre: No; that is the complete set of bids and tabulations upon which they are based.

Trial Examiner Norwood: Is the supporting data marked?

Mr. MacIntyre: It is not marked, and for that reason we ask for the Reporters to give them all numbers this afternoon in each of the folders.

Trial Examiner Norwood: Just give each folder a separate number. They are all bound.

Mr. Withrow: Why do these have to be marked now? We were entrusted with the supporting data for 10 days without marking, and at 4:15, our closing time, he wants them marked so that we won't get the documents until evening.

Trial Examiner Norwood: I suggest we give a 19984 number to each one of these.

I will take the responsibility of turning them over to Counsel without being marked.

Mr. Withrow: As soon as 2450 is sub-numbered?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: It has never been offered in evidence.

Since it is now offered in evidence, even though it is a bound volume, we insist it be marked. The Reporter can mark it at the close of the hearing, as soon as possible, but we want the record to show them marked at the hearing.

Trial Examiner Norwood: Yes; that is all right.

(The document referred to was thereupon marked for identification as Commission's Exhibit 2450-A to 2450-R-15.)

Washington, D. C.,
April 26, 1939.

19999 (COM. EXS. 2624-A, 2624-B, 2379-A, 2379-B, 2237, 2233-A, 2233-B, 2234, 2235, and 2236 were offered and received in evidence.)

Trial Examiner Norwood: As to this other proffer, I see here these papers attached and part of it consists of the cement code. The date is June 17, 1933, and it doesn't seem to be numbered or sub-numbered.

I should like to know just what that proffer is.

Mr. Wooden: There was a—

Trial Examiner Norwood: The Code is already in, isn't it?

20000 Mr. Wooden: It was in this folder here and only certain papers marked in that folder were offered.

Trial Examiner Norwood: These papers?

Mr. Wooden: Yes. In other words the folder was just as it was produced by the witness from their files—

Mr. Wooden: (Continuing) —and left that way in order that whatever inference might be drawn from the presence of the papers in that kind of a file as kept by the witness might be drawn.

Trial Examiner Norwood: In other words, this proffer here, Commission's Exhibit 1501-A and B, 1500 and 1499 are papers kept in a file marked "Cement Institute"?

Mr. Wooden: That is right.

Trial Examiner Norwood: And kept by Harold Cree, the sales manager for Aetna?

Mr. Wooden: That is right.

Trial Examiner Norwood: The numbers enumerated are received in evidence; the objections are overruled.

(COM. EXS. 1501-A, 1501-B, 1500, and 1499, were offered and received in evidence.)

20001 Trial Examiner Norwood: The other papers may be detached from that folder as the description has gone into the record on it.

As to Commission's Exhibit 2598-A to C, for identification, the point made by Mr. Withrow regarding some of the contents there is well taken.

This official makes statements here about cutting the combine price and a great many things that go to the vital issue of the case, here. These are recitals in the minutes of this highway association.

I don't think that that should be received; that that kind of testimony should be put in in this way.

However, there was a point made by Respondents as to the disposition of these bids as to the awards and it was stated that this information should come in to complete this witness' testimony. There is no objection to receiving this strictly for the purpose of indicating how these awards were made and to whom and what price and so on. These collateral matters may be shown in this way.

Mr. Withrow: We are not offering that document and we have not raised the point as to what awards were made in the State of Oklahoma and I think you are confusing our objections to certain tabulations of bids in the State of Missouri with the State of Oklahoma.

20002 We are not interested whatsoever in any award made in Oklahoma and have never made any point about that.

Mr. MacIntyre: On the point of this exhibit showing what action was taken most certainly would not be a matter dealing with hearsay. It is a formal record of minutes of a meeting of the Oklahoma State Highway Commission and the action taken by that Commission at one of its meetings.

So far as it shows that there was such a meeting and certain action was taken, we submit that is competent evidence.

Trial Examiner Norwood: I think Counsel would stipulate that that action was taken.

Mr. Zimmerman: It is not so much the matter of a formal action that was taken within the scope of the authority of the Commissioner; they didn't stop with that.

It contains expressions of opinions which would absolutely be incompetent under any circumstances and there

is no excuse for getting those things into the record merely because they occurred at a meeting of the Highway Commission. That, I think, is what sticks out.

Trial Examiner Norwood: I think Counsel's remarks are well taken.

Mr. Wooden: The document was offered, as I said
20003 yesterday, on the theory of res gestae and, of course, that carries with it the implication that the bids that were the subject of discussion as shown by those minutes are also offered.

I just now learned that while they are among the bids produced and identified that they have not been, as yet, offered.

I wish to give notice that they will be offered as a part of this showing here in the minutes of the Oklahoma Highway Commission.

Mr. Leisure: If your Honor pleases, if Mr. Wooden is offering this seriously on the theory of res gestae I would suggest I haven't looked at that subject in a good many years, but I do recall and there is a well-known rule of thumb that any written document cannot be res gestae; namely, if you have time to sit down and think it over and write about it, it is not res gestae, and I am positive a meeting held after an event and you write it up as a meeting giving minutes, that, in no sense, in no instance can it be res gestae.

If your Honor wants a memorandum of law on that and wants us to take time to prepare it, I will be glad to do it.

I don't think there can be the slighest question that a written document minutes of a meeting can be
20004 res gestae.

Mr. Wooden: They received letters written after and during the course of the events in question.

Trial Examiner Norwood: Yes, but these were writings and records made by other parties.

Mr. Leisure: (Addressing Mr. Wooden) Not on the ground of res gestae.

Trial Examiner Norwood: Yes, but these were writings and records made by other parties.

Mr. Wooden: They were third parties.

Trial Examiner Norwood: A great many of these documents are the transactions themselves and the breadth of the field of real res gestae depends entirely upon what the investigation is; both as to time and circumstances.

Mr. Zimmerman: I am not prepared to make any statement upon the admissibility or inadmissibility of the bids themselves. That is a question that seems to me to be quite separate and distinct and when those are offered we shall make such objections then, if any, that we may have.

Trial Examiner Norwood: I shall not take in those exhibits at this time.

20013 (COM. EXS. 2493, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2507, 2503, 2505, 2595, 2471, 2510, 2514, 2521, 2528, 2536, 2556, 2558, 2559, 2560, 2568, 2585, 2590, and 2594 were offered and received in evidence.)

20019 (COM. EXS. 3042, 3043, and 3044 were offered and received in evidence.)

20020 (COM. EX. 3109 was offered and received in evidence.)

Mr. Withrow: Our next objection is to Commission's Exhibit 3111-A to J, inclusive.

This exhibit consists of correspondence between Counsel for the Federal Trade Commission and C. H. Garrity of the Tennessee Valley Authority, together with certain photostatic enclosures.

20023 Mr. Wooden: I offered those, your Honor, just like I did those with the State of North Carolina Highway Commission agent, in the hope that Respondents would be willing to stipulate that if recalled those gentlemen would identify those documents there proffered, and testify to their authenticity, and also testify to the effect stated in their correspondence.

Do I understand that such a stipulation is not acceptable?

Mr. Leisure: No such stipulation has ever been made.

Mr. Wooden: I know that.

Mr. Leisure: Or offered or suggested.

Mr. Wooden: I am offering it now.

20024 Mr. Leisure: Your Honor pleases, ordinarily on stipulations of that kind I have always taken the position that where it went merely to identification we would not object; when there is not something else involved.

Trial Examiner Norwood: Yes.

Mr. Leisure: That is if by so stipulating we are waiving our right of cross-examination, then, I think, it presents another problem.

I will be glad to consider both of those.

Mr. Wooden: Yes.

Mr. Leisure: And see if there is anything more
20025 than identification.

Mr. Wooden: And let me know this afternoon?

Mr. Withrow: We will do our best to let you know.

Trial Examiner Norwood: Yes.

Mr. Wooden: I might suggest in that connection, if it is merely a matter of identification that the papers produced under subpoena duces tecum would have come under that category, and yet we could never get a stipulation as to identification of those.

Trial Examiner Norwood: Well, if Counsel may waive it then we may consider the papers on the questions raised by the Respondents here as to their relevancy, and so forth.

Mr. Withrow: Your Honor, we will consider Mr. Wooden's proposed stipulation--

Trial Examiner Norwood: Yes.

Mr. Withrow: --and report as soon as we can.

Trial Examiner Norwood: Yes.

Mr. Withrow: The next exhibit which we have, and I believe your Honor has already the original document offered, is Commission's Exhibit 3112.

20028 Trial Examiner Norwood: Is the objection based on the identification?

Mr. Withrow: We have made no objection on the grounds that Mr. Mallory did not prepare it.

Trial Examiner Norwood: Well, it seems to me that it contains some information there about these matters that were already gone into.

20035 Trial Examiner Norwood: I think this is information the Commission has the right to put in evidence.

Mr. Zimmerman: Then they should lay the foundation for it and get the facts that are essential for its admission in evidence.

Trial Examiner Norwood: Does the Counsel want to require him to bring back Mr. Mallory?

Mr. Zimmerman: I don't care whether they bring back Mr. Mallory or not. I am not interested. I maintain there is no foundation whatever for this document in evidence.

Trial Examiner Norwood: I shall reserve the ruling on that until I study the record and see what the witness did testify to.

Mr. Wooden: The showing of the authenticity of the

document as prepared by Mr. Mallory is sufficient, Your Honor.

Trial Examiner Norwood: You mean as evidenced by the document itself?

Mr. Wooden: No, but by Mr. Withrow's admission that they made no point of it.

20036 Mr. Zimmerman: Mr. Withrow has stated he didn't make any admission.

That is almost bordering on sharp practice to attempt to say Mr. Withrow has made an admission which is the foundation for the admission of this document in evidence, especially when Mr. Withrow stated he never said anything of the kind.

Trial Examiner Norwood: I don't think Counsel's remark is well taken. We don't want his conclusions.

20039 Mr. Withrow: The next objection we have, Your Honor, is to Commission's Exhibit 3093-A to 3093-14-O. This entire group of exhibits consists of documents which were turned over to Your Honor pursuant to a subpoena duces tecum served upon the Dewey Portland Cement Company, a Respondent in this case.

I would like to direct Your Honor's attention to the fact that these exhibits are now being offered in evidence although no witness testified at any time concerning their identification, and there has been no one on the witness stand who could vouch for the truth or accuracy of any of the documents in question.

The most that can be said is that these documents were turned over pursuant to a subpoena accompanied by an affidavit stating that these papers constituted books, records, papers, and documents requested under the subpoena.

We wish to object to these documents on the grounds they are incompetent, irrelevant, and immaterial. There is no offer of proof which would make these documents admissible as being relevant or material to any of the

20040 issues raised by the pleadings. There is no showing that the Institute or other Respondents ever saw copies of these documents or that they acted upon such documents.

The documents do not prove or tend to prove any of the issues in the case. Many of these documents come within the N. R. A. Code or interim period immediately following the N. R. A. Code and should not be included in this case.

We have made a long list of those and I am not going to give them, now. Many of these documents contain hearsay statements which are inadmissible under any of the exceptions of the hearsay rule, or even under the theory of admission of co-conspirators since they do not constitute admissions of fact or admissions made in furtherance of the conspiracy.

In this regard I direct Your Honor's attention especially to Exhibit 3093-A and 3093-12K to 3093-13C, inclusive. These hearsay statements have not been excluded from the offer made by the Commission pursuant to the rules of the Commission.

20042 Mr. Wooden: Mr. Withrow objects to the lack of identification and then, of course, quite naturally objects to the certificate that accompanies these papers from the auditor of the company. He certifies not only these documents from the records of the company, but they are authentic and true and correct records of the Dewey Company.

It seems to me that that disposes adequately of the matter of identification and authenticity of these
20043 documents.

(COM. EX. 3093-A to 3093-14O was offered and received in evidence.)

Mr. Withrow: The next group of exhibits that we have here consist of Exhibits 3177-A to CCCC, 3178-A to X, 3179-A to N, and 3180-A to 5Z.

This entire group of exhibits consists of about 250 invoices, which were turned over to a Federal Trade Commission investigator by representatives of the Consumers Company of Illinois, not a respondent in this case.

20046 Trial Examiner Norwood: What about the identification here?

Mr. Withrow: The identification, as I stated, Your Honor, consisted of an investigator on behalf of the Federal Trade Commission taking the stand and testi-
20047 fying that he went to this company and got these invoices from that company.

Trial Examiner Norwood: Yes.

Mr. Withrow: That is the identification.

We made a point of the fact that no one took the stand who could vouch for the truth or accuracy of the contents of the documents.

Trial Examiner Norwood: I think invoices of the Respondents found in the files of their customers—

Mr. Withrow: But there are many millions of invoices of these Respondents and I don't think Your Honor would take the position that any of those many millions—which would probably run into the hundreds of millions—should be received in this case without some showing that those particular invoices have some bearing upon the issues in this case.

Trial Examiner Norwood: They show prices here—

Mr. Zimmerman: May I ask, also: I notice, Your Honor, that you referred these were found in the files of customers of the Respondents.

May I suggest there is no showing in the record whatsoever they were found in the files of a customer or that any firm was a customer of the Respondent.

Mr. Wooden: They were found in the files of the largest dealer in the City of Chicago.

20048 Mr. Zimmerman: What is the testimony on that; being the largest dealer? Aren't you supplying that as a kind of a statement that you know or believe?

Mr. Wooden: Possibly so. I confess, I can't quite keep up with all this meticulous technicality.

Mr. Zimmerman: It is only a technicality to the extent we like evidence instead of Counsel's statement to make the record.

20049 Mr. Wooden: I think it is a matter of common knowledge in and around Chicago that the Consumers Company is the largest dealer there, probably.

Mr. Zimmerman: May we adopt the Examiner as a Chicagoan so that we may take judicial notice of that?

Trial Examiner Norwood: I do not think we ought to take time on that.

Mr. Wooden: I do not, either, as far as that is concerned.

Trial Examiner Norwood: Proceed.

Mr. Wooden: Your Honor, I would just like to say that these Chicago invoices were introduced for a special purpose as bearing upon the so-called arbitrary prices in the City of Chicago, and suburbs, arbitrary in the sense of not being the sum of base prices plus freight.

Mr. Zimmerman: Well, now—

Mr. Wooden (Continuing): And the other invoices as of April, 1938, do not include the City of Chicago.

Mr. Zimmerman: No matter what the purpose is there still should be a proper compliance with the ordinary orderly rules of evidence. If Counsel has a purpose of showing what the price was of cement sold in Chicago at any particular time by any particular Respondent there are very simple methods quite within the rules of evidence to bring that evidence out. That is not it.

20050 Trial Examiner Norwood: Don't you think an invoice from your client to one of its customers found in the channels of trade—and which he can show is wrong, if it is wrong, very easily—

Mr. Zimmerman: It is not our job to supply deficiencies of that kind. We are not aware of anything in this record, whatsoever, that is not properly offered in evidence, and we are not bound to go to the trouble of attempting to seek out matters to show whether it is right or it is wrong. We are entitled to have matter offered in evidence in a proper manner in the first instance.

Mr. Wooden: I would just like to refer, in this connection, to the United States Circuit Court of Appeals in the Second Circuit in a case involving a Commission proceeding, where it held that evidence, even though not strictly competent, if of the sort that affected the ordinary fair-minded man in the conduct of his daily and more important affairs, should be received, and, certainly, it seems to me that original invoices, files of the dealer, come within such category.

Mr. Zimmerman: There is no showing that this is a dealer, or that these are original invoices, or that the dealer ever bought anything from any Respondent.

20051 Trial Examiner Norwood: Well, I do not follow the contention of Counsel as stated, in any case, in taking in anything that somebody might think that an ordinary business man would consider in his more important affairs, because I think that that makes an indefinite standard there—

Mr. Zimmerman: Yes.

Trial Examiner Norwood: —to be determined.

Mr. Zimmerman: It does. We do not know what an ordinary business man is, to begin with.

Trial Examiner Norwood: Yes. It is easier to find out what is admissible in evidence than to find out what an imaginary business man would think should be omitted in evidence.

Mr. Leisure: That is very true.

Mr. Zimmerman: Yes.

Trial Examiner Norwood: But these invoices here from these Respondents, I shall look up the record and see how they have been identified, and if it seems to me that they might be considered here, I will consider them, and
20052 we are necessarily making this inquiry very broad, and all of these prices are of interest made by any of these Respondents at any time.

Mr. Zimmerman: Well, I may say this, that if he wants to know what Marquette sold cement for in Chicago on the 8th day of October, 1938, I should be very glad to furnish that information. If that is all there is in this, why, it is so simple we do not have to clutter the record up with a lot of stuff of this sort.

Trial Examiner Norwood: Well, I shall defer the ruling on that, and perhaps Counsel can come to some agreement about it.

Go ahead.

Mr. Wooden: I know that is hopeless.

20056 (COM. EXS. 3178-A to 3178-X, inclusive; 3179-A to 3179-N, inclusive, and 3180-A to 3180-6A, inclusive, were received in evidence.)

Mr. Wooden: Might I inquire at this time as to the fate of my suggested stipulation as to what Mr. Betts would testify to if recalled, and Mr. Garrity?

Mr. Leisure: We have not touched them yet.

Mr. Wooden: Well, then, if there is no report on that, may I suggest that we take up next the matter of the objections to the original bids to the North Carolina Highway Commission.

Mr. Withrow: Your Honor, those were the precise
20057 things I was going to take up next.

Trial Examiner Norwood: Go ahead.

Mr. Zimmerman: Do you not want to clear the record, or is your record clear on those exhibits C, D, E, and F?

Mr. Wooden: No, I will take that up a little later.

Mr. Zimmerman: All right.

Mr. Withrow: Mr. Wooden has asked us to object to the North Carolina bids, and those were the ones we were going to take up. This group of bids have been marked for identification with the following numbers:

3062-A to Z; 3063-A to GG; 3064-A to P; 3065-A to Z; 3066-A to X; 3067-A to AA; 3068-A to U; 3069-A to GG; 3070-A to R; 3071-A to BB; 3072-A to PP; 3073-A to O; 3074-A to L; 3075-A to T; 3076-A to G; 3077-A to K; 3078-A to V; 3079-A to J; 3080-A to L; 3081-A to V; 3082-A to M; 3083-A to R; 3084-A to KK; 3085-A to P; 3086-A to E; 3087-A to I; 3088-A to G; 3089-A to F; 3090-A to H; 3091-A to F; 3092-A to U; 3177-A to 3177-4C.

This entire group of exhibits, Your Honor, consists of documents which were turned over to the Federal Trade Commission according to statement by Counsel for the Commission by William Z. Betts, of the State Highway and Public Works Commission of the State of North Carolina.

20058 I would like to call Your Honor's attention to the fact that Mr. Betts was a witness in this case in December, 1937, one of the first witnesses in this case.

Trial Examiner Norwood: Yes.

Mr. Withrow: And I would also like to call Your Honor's attention to the fact that these documents are now being offered in evidence although they have not been identified by any witness, and no one has testified concerning them who could vouch for the truth or accuracy of any of the documents in question. The most that can be said is that Counsel for the Commission has requested these documents from W. Z. Betts of the State Highway Commission, and that pursuant to that request on March 3, 1939, Mr. Betts forwarded certain papers, together with an attached statement now offered in evidence as Commission's Exhibit 3063-A.

The documents themselves purport to consist of the invitations and bids made to the State of North Carolina Highway and Public Works Commission.

20059 We object on the grounds that these documents are incompetent, irrelevant, and immaterial. They are not properly identified. They do not prove or tend to prove any of the issues of the complaint. The 20060 purported authentication of these documents by stamped facsimile signature of William Z. Betts does not constitute authentication as a matter of law, and we object to it as improper and constituting no identification or authentication whatsoever.

In the event photostatic copies are substituted for the originals we want to point to the fact that certain material

has not been photostated, to-wit. On Commission's Exhibit 3062-Y and Z there are clock stamps on the back of those documents stating: "Received February 12, 1937, York Office," and an arrow pointing at twelve o'clock noon.

In other cases we have been willing to waive such receipt stamps, but we must insist upon it in this case.

20061 Mr. Wooden: Of course, Your Honor, any defect or shortcomings in the photostating will readily be remedied, but I should like to inquire whether Respondents' Counsel are willing to stipulate that if Mr. Betts were recalled as a witness he would identify these papers to which objections have been made as being the original bids received from the various bidders by the High-

20062 way Commission of North Carolina? With the evidence before them of Mr. Betts' facsimile signature and his facsimile signature is on each page of these papers, are they willing to agree Mr. Betts would identify them?

Mr. Withrow: In December, 1937—that is almost a year and a half ago—Mr. Betts did identify certain bids which we understood was the basic material for Exhibits 11 and 12.

That basic material was turned over to us by Counsel for the Commission.

This group of exhibits which I have referred to, here, contains papers in addition to that basic material turned over to us by the Commission so that either we are now being asked to stipulate Mr. Betts was wrong in 1937, or that his testimony in 1939 would be different from his testimony in 1937 and I don't think we should be called upon to do that.

There are documents in there that were not tendered to us as being bids made when we were originally given the papers and I don't think we could stipulate although we would be glad to take it under advisement and see if we can't work something out.

Trial Examiner Norwood: He asked you if you would stipulate in regard to all of them whether or not this

20063 witness would testify they came from those files, not to stipulate that they did come from the files but that the witness would so testify if he were here, thereby saving the time and expense of bringing this witness from North Carolina.

Mr. Wooden: There is the certificate that accompanied the papers from Mr. Betts.

Trial Examiner Norwood: So Counsel can let him know about that, or, if he doesn't want to certify to those new ones, let him know if he will stipulate in regard to the ones originally submitted.

Mr. Withrow: The only way we can do is to check with the Respondents as to each of the bids made. It will take a little time and it is only because it appears that there are discrepancies and we have a record of what was originally offered, we have that before us. I think that is the only way we can work it out and we will do that as fast as we can.

20064 Trial Examiner Norwood: He is asking you to stipulate that this witness would testify that those belonged to his files and that they were produced from the official files in North Carolina.

Mr. Leisure: Of course, Your Honor, I don't know what the witness would or would not testify. He is not one of my witnesses.

Mr. Wooden: He might be struck dumb on the stand and couldn't say a word.

20065 Trial Examiner Norwood: I suggest you simply tender them to the Respondents for checking with 11 and 12 and that 11 and 12 remain—

Mr. Wooden: They had them once before for that purpose, Your Honor, and then submitted their objections and criticisms of the tabulations and moved to strike the tabulations.

Now here we have the original basic data and they won't even admit it is original basic data.

Trial Examiner Norwood: If there are motions pending to withdraw Commission's Exhibits 11 and 12 I shall deny them with the understanding that you present the

20066 supporting data here and now to the Respondents for checking.

Mr. Wooden: That has been corrected.

Trial Examiner Norwood: That is all that is required.

Mr. Wooden: That has been corrected.

Mr. Zimmerman: I shall not undertake any responsibility in the matter of checking these at all.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: Well, that is Counsel's responsibility whether he takes it or not.

Mr. Zimmerman: No, that is not.

Mr. MacIntyre: If Your Honor please—

Mr. Zimmerman: It cannot be thrust upon me at all. I shall take no responsibility in the matter, and I want the record clearly to show that.

Trial Examiner Norwood: Well, Counsel may act as he deems advised.

Mr. Zimmerman: Yes.

Mr. MacIntyre: Your Honor please, in order that the record may be perfectly clear on what has taken place here, let it show that the Respondents' Counsel had tendered to them in December, 1937, basic data upon which Exhibits 11 and 12 were based, for their checking. All of that basic data, and even additional data that could be scraped together by the State of North Carolina two or three weeks ago was submitted to Counsel more
20067 that 10 days ago for the purpose of checking again.

Trial Examiner Norwood: Well, now, that data was—that data consisted in the original bids?

Mr. MacIntyre: The original bids.

Trial Examiner Norwood: Which the witness brought here and identified while he was on the stand?

Mr. MacIntyre: That is correct; that is correct.

In order that we may now have it more clear as to what Mr. Wooden has at this time proposed, let it not be understood that he is asking that any stipulation be entered into that these papers are true and correct papers of anything that the Respondents have in their files, that can be checked against these; but Mr. Wooden has merely asked—he has not asked that—he has merely asked that the facts as set forth in Commission's Exhibit, for identification, 3063-A, over the signature of W. Z. Betts, to the effect that he certified that these papers were true and correct documents in the form of bids received from these people as he found them in the official files and handled them as an official of the State of North Carolina, and that he would so testify if he was called as a witness.

Now, here is his letter over his signature. If the Counsel do not believe that Mr. Betts, if called now, would testify as he has written, then, of course, they have all
20068 the right in the world it appears, to say "No, we will not stipulate"; but if they have no doubt that Mr. Betts would testify as he has written on Exhibit 3063-A, then, it seems that it would be absolutely absurd to have

to call Mr. Betts back here to testify to the facts that are set forth in the Exhibit 3063-A.

That is what it simmers down to, and nothing else.

Mr. Withrow: Your Honor, I think we have stated what we would do is try to correct this situation, so nothing further is necessary on that; but I do not think that Mr. MacIntyre has completely stated the record, and so I will try to state it, as I understand it.

Mr. Betts testified in December, 1937. Mr. Hugh White made a tabulation of the bids which Mr. Betts brought here, which bids at that time were numbered 11 and 12, in bulk, the two years. We were given the bids to check. We came in and made a report at length on the record, pointing out wherein we felt tabulations 11 and 12 were incomplete and incorrect.

In spite of that the original bids, apparently, according to Counsel for the Commission, were returned to the State of North Carolina, so that nobody knows what has happened to those bids.

We now get back from the State of North Carolina a new batch of documents which Mr. Betts in a covering
20069 letter says are certain bids of 1936 and 1937, and we find certain material in those papers which was not in the original papers given to us, and no witness has ever taken the stand and ever identified them, and we do not feel that this is a proper method of procedure.

Trial Examiner Norwood: Well, they have already expressed it.

The last proposal, however, there. I do not think that we received a reply to that. That is, if these new
20070 invoices, new bids, were taken out, would Respondents then waive identification, or stipulate that the witness would give the identifying testimony?

Mr. Zimmerman: I would not.

I will clear up the record now so far as we are concerned, in view of the attitude that has been taken in this matter. I think it has been entirely subversive of any attempt to get together on a friendly stipulation, and I shall not enter into it.

20074 Mr. Withrow: The next group of exhibits, Your Honor, that we would like to object to, consists of a whole series of exhibits which are numbered from Commission's Exhibit 3188 to Exhibit 3200, and you will find them strewn through those two volumes.

(Mr. Withrow hands documents to the Trial Examiner.)

Trial Examiner Norwood: Yes.

Mr. Withrow: This entire group of exhibits consists of portions of the record which Counsel for the Commission have selected from the transcript of the record before the United States Supreme Court in the case of the Cement Manufacturers Protective Association, et al., vs. the United States of America,—sometimes referred to as the "Old Cement Case."

We have already objected to these documents in a general way on the grounds that they are incompetent, irrelevant, and immaterial; and, on the further ground, that the facts submitted in the old case have already been passed on by the Supreme Court in that case. We do not feel that the record in this proceeding should be clattered up with facts and documents which the court passed upon in that case.

None of these documents have been property iden-
20075 tified, and we object to their admission in evidence on that ground.

20086 Mr. Leisure: As to those documents that have been offered on the old case I would like to point out to Your Honor in considering this case Counsel for the Commission has apparently gone over that case and
20087 picked out certain things he wanted to raise in this case.

Of course, the difficulty with retrying a case that has been tried before is that if he picks out those few things it will then be necessary for us to go into that case again and it is tantamount to retrying a case tried in 1925. It is, in effect, res adjudicata because the issues are the same and the parties are the same.

Trial Examiner Norwood: If there happened to be any admissions in there—

Mr. Wooden: You could—

Trial Examiner Norwood: (Continuing.) —you claim they could not be received if there happen to be some admissions in there on these present matters?

Mr. Leisure: They have gone far beyond that. They are not offering all these exhibits on the basis of admissions and I say, the vice of picking a few things out of a case and offering them simply means we will have to prolong this case long enough to try that case and this case, too. I don't think that should be done. This case is sufficiently long in and of itself and now, at the end of eighteen

months, to open up an entirely new vista of the old case and force us to retry that again. I don't think it should be done at this late date.

Mr. Zimmerman: I would like to supplement the objection so far as calling Your Honor's attention to
20088 the fact that neither the Respondent Marquette, nor a majority of the Respondents in this case were either parties to that litigation, members of the Protective Association or in any wise involved in it and that, therefore, unless and until there is some more direct connection made between the excerpts and statements offered from the record in that case than thus far appears, the matter is objectionable on that ground to Marquette and Respondents similarly situated.

Trial Examiner Norwood: How about that?

Mr. Wooden: Your Honor, all these portions of the old cement case record were offered as constituting admissions of some Respondents starting with the proposition that some 10 of the same Respondents in this case were defendants in that case and then proceeding to take some admissions made in their answers filed in that case and then some of the evidence to which they were parties in that case and they were all offered on the theory of admissions and this matter of retrying the case does not come into the picture at all. That is just a thing conjured up to meet the situation but there is no law to prevent the tracing back to its very beginning of any concerted action that is now in question and evidence of admissions made during the early period of that concerted action
20089 between any two or more of the present Respondents is competent and receivable against them.

As to the authenticity of these documents I had supposed that a certified official transcript of the record made to the Supreme Court of the United States for its consideration would dispose of the question as to whether these documents were authentic or not.

I will not pass any more comment on that—

Mr. Leisure: That is conjured up, too, so far as I am concerned. He shouldn't make such assumptions as that.

20090 Mr. Zimmerman: I don't believe I can add any limitations upon my statement, whatever was alleged in that Bill of Complaint and whatever was set forth in the answer and these exhibits.

20091 it did not constitute a violation of the law as charged in that complaint.

Your Honor will observe that it does involve Your Honor's studying that Bill of Complaint if you are going into that question at all. You must study that Bill of Complaint; you must study the pleadings in that case; you must study the Supreme Court's opinion; you must, therefore, familiarize yourself to that extent that it almost would amount to a reconsideration of that whole proceeding.

Trial Examiner Norwood: Could you take certain passages here and decide as to whether or not they constitute admissions of certain factual matters given in that case?

Mr. Zimmerman: No, it couldn't amount to anything more than this: That these parties did admit at that time that some time before the 1925 trial certain things were done.

Trial Examiner Norwood: Yes.

Mr. Zimmerman: But how does that in any wise connect up with this case?

Trial Examiner Norwood: If that factual material happens to be relevant in this case and there is an admission there, how would that involve my studying the whole case and overruling the Supreme Court, or something
20092 like that?

Mr. Zimmerman: Because whatever was done in that case was found not to have constituted a violation of the law.

Possibly they are not here, in this case, charging violations of the same Act as was charged in that case. I think they are. I think that you would want to know whether they are or not.

Now you say relevant? You mean, merely talking about the same subject-matter? That is not relevancy.

Trial Examiner Norwood: I think this is very clear, now, gentlemen.

I will have to study this thing and see if there are any admissions in here. If so, by whom were they made and also are they relevant in this case. I shall do that and defer the ruling and study the record.

20093 As to the identification: Does Counsel require further identification of this Supreme Court record? Is that right?

Mr. Leisure: Your Honor, I think it is such bad prac-

tice at the end of an 18 months' trial to bring in an old case and offer in the record and try to re-try the case, as I have suggested, and I again repeat it will be necessary to do that because if they pick out these certain things they want, we must answer them, and we can't answer them without going back and studying that record and the old case again.

I think it is such improper practice to do that that I raise every objection I can think of and stand on it.

20095 Mr. Wooden: I should like to make one further point, Your Honor, with regard to the old license agreements which expired before the case was brought and before the defendants' association was organized in the old case were, nevertheless, received in evidence as relevant material to the prior practices of the defendants, and those license agreements are just as relevant and material today to what those practices were at that time of some of these Respondents as they were then, and the evidence selected from this record and offered is also admissible against these Respondents if they were parties to it despite the fact that their present organization was not created or in existence at that time.

20140 Washington, D. C.,
April 27, 1939.

20144 (COM. EX. 3201-A, 3201-B, 3201-C, 3201-D, 3201-E, and 3201-F was offered and received in evidence.)

20198 W. Z Betts was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Wooden:

Q. Mr. Betts, I believe you testified previously, that you were the purchasing agent for the State Highway and Public Works Commission of North Carolina?

A. Yes, sir.

Q. Is that correct?

20199 Yes.

Q. (Indicating) I am showing you a number of

papers which are photographs of documents, and which bear the numbers for identification as:

Commission's Exhibit 3062-A to Z, inclusive,
3063-A, 3063-B to GG, inclusive,
3064-A to P, inclusive,
3065-A to Z, inclusive,
3066-A to S, inclusive,
3067-A to AA, inclusive,
3068-A to U, inclusive,
3069-A to GG, inclusive,
3070-A to S, inclusive,
3071-A to BB, inclusive,
3072-A to PP, inclusive,
3073-A to L, inclusive,
3075-A to T, inclusive,
3076-A to G, inclusive,
3077-A to W, inclusive,
3078-A to V, inclusive,
3079-A to J, inclusive,
3080-A to L, inclusive,
3081-A to V, inclusive,
3082-A to M, inclusive,
20200 3083-A to R, inclusive,
3084-A to KK, inclusive,
3085-A to F, inclusive,
3086-A to L, inclusive,
3087-A to Q, inclusive,
3088-A to G, inclusive,
3089-A to F, inclusive,
3090-A to H, inclusive,
3091-A to F, inclusive,
3092-A to U, inclusive (showing documents to witness).

Mr. Betts, will you examine those papers which I have indicated, and tell us the extent of your knowledge concerning them, or of your knowledge concerning the original papers of which these are photostats.

(Witness examines documents.)

Q. Mr. Betts, may I ask you while you are doing that, whether you have previously looked over these papers before taking the witness stand?

A. Yes, sir.

Q. Will that enable you to answer the question that is pending any more quickly?

A. Yes, it is entirely satisfactory. I thought you wanted me to look each one over.

Q. I want you to satisfy yourself

20201 A. Well, they are the—these copies represent copies of all of the requests for bids, the actual bids that were made, signed contracts, and acceptances, and correspondence covering the purchase of cement by the State Highway and Public Works Commission.

Q. For what letting?

A. For the period March 1, 1937, through March 1, 1938.

Q. You spoke of correspondence. What correspondence, with whom, or between whom?

A. Between the State Highway and Public Works Commission, and officials of the various cement companies. The correspondence in question being the acceptance of the bids that had been made by the companies, and also extensions of contracts. In other words, we extended these contracts one year into another year on account of market conditions.

Q. Did you handle the correspondence, yourself?

A. Yes, sir.

Q. Is there some, or any, identifying marks on these papers that enables you to say positively that they are?

A. At your request, in transmitting these papers, you asked me to put some identifying mark on each sheet, and my name is stamped on each sheet to identify the—

Q. Is that your facsimile signature?

A. Yes, sir.

Q. Did you also accompany the papers with any

20202 form of certification to these being the original papers that you forwarded and of which these are photographs?

A. In transmitting these papers under date of March 3, 1939, a form of certification was attached to which my name was signed.

Q. And is that paper marked Commission's Exhibit 3063-A, for identification (indicating)?

A. Yes, that's it, the paper in question.

Q. You spoke of the period there, Mr. Betts, covered by these bids as being 1937 to 1938.

I will ask you to examine them again and see if some were an earlier period.

A. (Witness examines documents.)

Q. Does your certification form, Commission's Exhibit 3063-A, help you?

A. They are. They cover two periods here, one for 1936, for the year 1937, and one for the year 1937.

I was just examining one contract there, and then we extended this 1937 contract for a period of one year, so there are two sets of contracts on these files here.

Q. (Indicating) Now, I am showing you papers marked for identification as Commission's Exhibits 3101-A, B, 3101-C to Y, inclusive. Can you tell us what those documents are?

A. (Witness examines documents) Document 3101-A is a letter dated March 9, 1939, in answer to your
20203 telegram of March 8, 1939.

Q. Which telegram is incorporated in your reply?

A. Yes, yes.

Q. What are the other papers?

A. (Witness referring to Commission's Exhibit 3101-C) The documents in 3101-C is a record that is kept in my office of each letting of the State Highway and Public Works Commission.

These separate sheets represent the various lettings that are held by the State Highway and Public Works Commission, which shows the project number, the number of barrels, date awarded, the time limit, the name of the cement company, shipping points and prices, and names of contractors.

Q. Do you vouch for the correctness of the information contained in those sheets?

A. I do. They are supposed to be correct, but in any set of records there might be some slight errors; but they are supposed to be correct all the way through.

Q. Were they records which your Commission kept and used in the course of its official duties?

A. Yes, we have been keeping this record for several years on our various cement lettings.

Q. (Indicating) Now, I show you papers marked for identification as Commission's Exhibit 3100-A to 3100-S, inclusive.

Will you tell us what those are?

A. (Witness examines documents) (Referring
20204 to Commission's Exhibit 3100-A): Document C-N 3100-A is a letter dated March 3, 1939, written to Mr. Walter B. Wooden, Attorney of the Federal Trade Commission in answer to his telegram of March 3, 1939.

Q. Is that your letter?

A. This is my letter, requesting additional information from the records of the State Highway and Public Works Commission.

Q. What are the other papers?

A. (Witness refers to Commission's Exhibit 3100-C) Document number C-X-3100-C is an explanatory sheet that was attached to certain documents containing information which was requested in your letter of March 3, 1939.

Q. Who was the author of the explanatory sheet that you refer to?

A. Myself.

Q. What are the other papers?

A. (Witness refers to Commission's Exhibit 3100-D). Document number C-X-3100-D is a yearly record kept by months—a correction there—is a yearly record kept by various lettings of the State Highway and Public Works Commission showing allocations to the various cement companies with whom the State of North Carolina had cement contracts.

Q. During what period?

A. (Witness refers to Commission's Exhibit 3100-D) Document number C-X-3100-D covers a period 1935, and the months of January and February, 1936.

Trial Examiner Norwood: You refer to the exhibit identification numbers? Were you doing that?

The Witness: Yes, in each instance.

A. (Witness referring to Commission's Exhibit 3100-E) Document number C-X-3100-E—

Trial Examiner Norwood: That is not the exhibit number.

Mr. MacIntyre: That is the Reporter's designation.

Mr. Wooden: That is Commission's Exhibit 3100-E.

Trial Examiner Norwood: Oh, I see. Go ahead.

A. (Resumed)—is the record kept by us of the various—of allocations of cement made against cement contracts with the various cement companies, for the year March 17, 1936, through January 26, 1937.

(Witness referring to Commission's Exhibit 3100-F). Document C-X-3100-F is a record of allocations against cement contracts with the various cement companies for the period March 16, 1937, through December 21, 1937.

The dates shown on each of the documents C-X-3100-D, C-X-3100-E, and C-X-3100-F are the dates on which let-

tings are held by the State Highway and Public Works Commission during the period shown.

(Witness referring to Commission's Exhibit 3100-20206 G) Document C-X-3100-G is an explanatory statement by myself of attached documents, which documents are monthly reports representing actual shipments by the various cement companies during the years 1936 and 1937.

(Witness referring to Commission's Exhibit 3100-H) The Commission's documents C-X-3100-H through 3100-S, are monthly reports of cement used by the State Highway and Public Works Commission for each month during the year 1936.

(Witness examining Commission's Exhibit 3100-T through 3100-EE) The documents C-X-3100-T through C-X-3100-EE are monthly reports showing the amount of cement used by the State Highway and Public Works Commission during the year 1937.

By Mr. Wooden:

Q. These papers that you have just testified about, which, if any of them, were prepared especially for, or compiled especially for the purposes of sending them here?

A. (Witness referring to Commission's Exhibit 3100-A) C-X-3100-A.

Q. That is your letter?

A. (Witness referring to Commission's Exhibits 3100-B and C) C-X-3100-B and C-X-3100-C.

Q. Is that your explanatory statement?

A. Yes.

Q. All right.

20207 Do I understand, then, that—how about Commission's Exhibit 3100-G?

A. Yes, C-X-3100-G, that is just a short explanatory statement.

Q. Will you tell us, then, whether all of the other documents that you have described were or were not documents that were kept by your Commission for its own purposes in the regular course of its official duties?

A. In addition to those that were specially prepared, my letter of March 9, 1939, 3100-A and 3100-B was prepared.

Q. Yes, that is your letter to me.

A. Yes, that is right.

(Witness referring to Commission's Exhibit 3063-A) And the certification, dated March 3, 1939, C-X-3063-A.

Q. Does your facsimile stamped signature appear on the Exhibits 3100-D to 3100-EE?

A. Yes, sir.

Trial Examiner Norwood: Off the record.

(There was a short discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. Wooden: Now, Your Honor, the original bids of which this series beginning with Commission's Exhibit 3062, I believe, are photostats, are in the possession of Counsel for the Respondents.

I asked that they be here this morning, but I
20208 understand they were sent to New York and will not be here until 2 o'clock.

Commission's Exhibit 3074-A to L was among those original papers, but the photostats here do not include that number, but it is one of these bids. I am wondering if Respondents' Counsel will not concede that Mr. Betts would identify that original paper, Commission's Exhibit 3074-A to L, as one of the bids like he has done with these other photostats.

Mr. Leisure: Certainly we will, and I think that if Counsel had gone ahead as we suggested we would have avoided this difficulty, and also the necessity of taking time of explaining why he has not got the originals.

Mr. Wooden: Well, I want to get through with the witness if I can.

Your Honor, at this time I wish to offer the photostats, and other papers which the witness has identified, and running from Commission's Exhibits Nos. 3062—well, I offer all of the numbers that the witness has identified, and including Commission's Exhibit 3074-A to L, which is not here at present, but is among the same type of papers and which—

20209 Trial Examiner Norwood: That is from 3062-3092, inclusive?

Mr. Wooden: Yes, and then 3100-A to E, and 3101-A and B.

Trial Examiner Norwood: Are there any objections to the identification? Other objections have been heretofore stated and Counsel may address themselves to this.

Mr. Leisure: No, that is not right, Your Honor. These are new exhibits we have never seen. He has offered, in addition to the offer that has already been made, additional—

Trial Examiner Norwood: You had those, too.

Mr. Wooden: You had all this, Mr. Leisure, and you would not agree that Mr. Betts would identify them if called as a witness.

Mr. Zimmerman: Now I would like to ask a question, if you please.

The witness made reference to documents which he said, as I understood it, were prepared in response to letters written by Mr. Wooden. I presume that those letters are included in this batch, are they?

Mr. Wooden: The letters—the telegrams are here and they are included in the—

Mr. Zimmerman: No, but he referred to letters 20210 that you wrote.

Mr. Wooden: A letter referred to of February 25; that is not here; but you can have it if you like.

Mr. Zimmerman: It isn't a question of what I like. I am not asking for anything. I am merely asking what the facts are.

Mr. Wooden: It is not here.

Mr. Zimmerman: All right. The matter which has been prepared in response to the letters does not purport to be original data; has nothing to do with the original bids at all, does it?

Mr. Wooden: It all has to do with either the original bids themselves or the allocations or shipments as a result of those bids.

Mr. Zimmerman: But not made at the time the original bids were received, but something prepared in response to a suggestion of yours in some letter?

Mr. Wooden: No, the witness has testified—he can correct me, if I am wrong—all these records of shipments and allocation and so forth were records kept by them in the regular course of their duties.

Trial Examiner Norwood: The record speaks for itself, as to this identification.

If Counsel has any objection, let him state it.

Mr. Zimmerman: Let me ask the witness a ques-
20211 tion, then.

Examination on the Voir Dire by Mr. Zimmerman.

Q. Are there any papers here that are included in this matter that Mr. Wooden has asked you to look over and has just questioned you about which were prepared recently in response to something Mr. Wooden asked you to do in a letter?

A. No, sir. All of the data and information which has been presented here are records kept in the office of the purchasing department of the State Highway and Public Works Division in the normal course of its operation.

Trial Examiner Norwood: He designated those particular exhibits he had prepared, specially, to send here, and those were the letters.

Mr. Zimmerman: That is what I am trying to find out. The witness now says there was not anything prepared specially to send here.

Trial Examiner Norwood: I suggest Counsel state his objections and you can cross-examine this witness all you want to later.

Mr. Wooden: There are two little memorandum which he attached.

Mr. Zimmerman: If Your Honor rules that I cannot ask him—

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

20212 Trial Examiner Norwood: Back on the record. Have you completed your examination?

Mr. Wooden: Yes. I have made an offer and I am through with the witness.

Trial Examiner Norwood: Cross-examine him.

Cross-Examination by Mr. Leisure.

Q. Mr. Betts, you testified here once before in this proceeding?

A. Yes, sir.

Q. When was that, please? I don t mean the exact date. I am not trying to test your memory. I am trying to fix the time, approximately.

A. It was in December of 1937 if I remember correctly.

Q. December, 1937?

A. I think that was the time.

Q. And you brought with you, at that time, certain exhibits, did you not, which you submitted to the Counsel for the Commission?

A. Yes.

Q. And certain of those exhibits were offered in evidence while you were on the witness stand, were they not?

A. Yes.

Q. And those exhibits, part of them, are the same ones that you have been examining here; these are pho-
20213 tostats of the same exhibits, to some extent?

A. Yes, sir.

Q. There have been additional exhibits, however, added since that time, as I understood you?

A. There were either one or two bids, I believe, that are in this lot, here, that were submitted by companies whom we did not make a contract with.

Q. And which you did not submit, then, the first time?

A. And which we were requested to submit at a later date.

Q. Which were not in the first group?

A. That is right, but they are here now.

Q. This group here, is that a stamped signature—

A. That is a rubber stamp with my name on there.

Q. Was that placed on at the time these letters were sent out or was it placed on subsequent to that time?

The Witness: Which letters are you referring to?

Q. All of them; the ones that have this rubber stamp here (indicating).

A. Yes; I see—ask your question again, now.

Mr. Leisure: Just read it, Mr. Reporter.

(Question read.)

A. Of the letters sent out? Whose letters?

By Mr. Leisure:

Q. All of these documents that you have produced here. It won't be necessary to call them off, going from
20214 3062-A to Z down to 3092-A to V. They all bear a rubber stamped signature. I am now asking you whether or not that stamp was placed on at the time the transaction occurred or whether it has been placed on at a subsequent time.

A. Placed on at the request of Walter Wooden.

Q. So that if we had received those in evidence the

other day with me believing that was placed on at the time they went out I would be wrong to that extent?

Mr. Wooden: I object to the question as unfair. This (indicating a document) shows when it was placed on, in this exhibit; that shows when and why it was placed on.

Mr. Leisure: What is unfair about my question? It was offered and I looked at it and I suppoesd when I looked at it the stamp was placed on at the time it was sent. What is unfair about it?

Trial Examiner Norwood: The objection is overruled. I think Counsel may ask the witness that.

20215 Q. Mr. Betts, when we adjourned we were just discussing this stamped signature on the exhibits. I suggested something about whether I would be misled. You, of course, did not misunderstand me, I hope. I was not suggesting that you had done anything that would mislead me in putting this stamp on.

A. No, sir.

Q. I thought perhaps I had not made that clear. Merely what I meant was, that if anybody read this as an exhibit without knowing that it was not placed there at the time of the writing of the exhibit, if they did believe that it was placed there at the time of the writing of the exhibit, that would not be correct.

It was written, as I understand it,—and it is the fact that I am interested in,—it was stamped there subsequent to the time that the documents were written?

A. That's right.

Q. That is correct?

20216 A. And at the request of Mr. Wooden.

Q. And at the request— There was a letter from Mr. Wooden, as I understood it, to you, asking you to—

A. To put—

Q. —to stamp that; is that correct?

A. To put some identifying mark on them.

Q. To put some identifying mark on them?

A. Yes, that's right.

Q. I think you said, Mr. Betts, that these documents were brought first when you were here in December,—that is, at least part of them were?

A. Yes.

Q. And you also told us, I believe, that the bids which were offered this morning constitute not only the ones which you brought when you were here in 1937, in Decem-

ber, but there is some additional material here now which was offered this morning.

A. Yes, sir; that's right.

Q. As I understand, the procedure when you were here before, you returned, and the bids which you had brought at that time, were subsequently sent back to you by Mr. Wooden, or someone in the Federal Trade Commission?

A. Yes, sir.

Q. And then, to follow it on through, Mr. Wooden recently asked you for the bids which were offered
20217 this morning; is that correct?

A. That is right.

Q. And you forwarded the bids to him after attaching the identifying mark which you chose in the form of the facsimile signature?

A. That's right.

Q. What employees of your office, if you know, actually did the physical stamping of those facsimile signatures?

A. My secretary did the stamping after I had examined the papers and turned them over to her to stamp. In other words, I answered Mr. Wooden's letter and looked over all of the papers, and dictated this letter, and gave her those documents which you have there to stamp my signature on as an identifying mark.

Q. Yes. And then you had her take the stamp and put it on, though?

A. That's right.

Q. Now, in addition to your secretary, do you have other assistants,—did you have a file clerk, for instance, obtain them from the files for you?

A. No, sir.

Q. Or did your secretary do that for you?

A. My secretary handled that.

Mr. Wooden: What was the answer?

The Witness: My secretary handled that, too.

20218 By Mr. Leisure:

Q. Now, Mr. Betts, what is the physical method of keeping exhibits in your office of this character, if you know? Do they have a separate folder in the file room under which papers relating to one subject matter are placed under the heading of that particular company?

A. On every item on which the State of North Caro-

lina requests bids, all requests for bids, actual bids that are submitted, contracts, acceptances, and correspondence relating thereto, are kept in a separate folder on that particular item.

Q. As I understand you, the papers received from that particular company, from whatever source, are placed in that folder?

A. Yes, that's right.

Q. If it has to do with that company's affairs?

A. Everything, correspondence, contracts, bids.

Q. Yes.

A. And everything that you see there is placed in that folder from that particular year, and then the next year we receive bids again on cement, everything pertaining to that particular contractual item, in the way of correspondence, requests for bids, contracts, and so on, are placed in that file, and kept there.

Q. I see.

So that all you had to do when you received the letter from Mr. Wooden was to instruct your secretary to
20219 bring you all the papers in a certain file which related to each company as designated by these bids?

A. That is correct.

Q. And, as I understand you, after your secretary had produced these bids you had her stamp them after you had looked at them, and you forwarded them on to him, and we have them here now?

A. That is correct.

Q. With regard to the invitations, do you recall now whether or not you personally sent out the invitations, each and every one of them?

A. My secretary sent them out at my request.

Q. At your request?

A. And I furnish her with a list of the companies to whom the requests for bids should be sent, and she, in turn, sends them out to the various cement companies.

Q. Now, what has been the practice, in your experience, Mr. Betts, after these invitations are sent out, are all of the invitations answered by mail, or has it been your experience that some companies will submit bids by means of salesmen handing them personally to your office?

A. Sometimes they are submitted by mail, and some companies probably will bring them in in person prior to the date and hour of letting.

Q. And all such papers, as I understand you, whether they are received by mail or whether they are re-
20220 ceived personally, if they belong to this particular file, and have the heading of that particular company, they would go in that company's file?

A. That's right.

Q. You, at the present time, would not be able to look through this file and say personally, of your own knowledge, which of the bids were received through the mail and which ones may have come by salesmen handing them in, would you?

A. I couldn't say, and there is no available record that would indicate.

Q. No. But regardless of how they did come, whether they came by mail or by salesmen handing them to you or someone in your office, with regard to all of these papers, if a bid comes in in response to an invitation by mail, what is the practice, if any, with respect to having a time-clock stamp placed on the bid?

A. We do not have a time-clock stamp placed on the bid at all. They are sealed bids and are not opened until the hour and date at which they are supposed to be opened.

Q. So that it is your practice to file them without placing any time stamp on them as to the exact hour when they are received?

A. That is correct.

Q. What would happen with respect to a late bid that came, Mr. Betts? How would that—

20221 A. A late bid would be automatically rejected. In other words, we do not give it consideration.

Q. You would designate it in some way—

A. Late.

Q. —as being a late bid?

A. That is right.

Q. And it would not receive any time stamp.

It is the practice of your department, is it not, to send out invitations to prospective bidders which would require the bidders to designate the prices at each of the county seats of the State?

20222 A. It is the practice, now, for us to include in requests for bids to the cement companies various destinations throughout the State of North Carolina for prices of cement delivered to these points.

20223 Prior to the requests for bids which were sent out this year we included only the basing points of the various cement companies and not destinations.

By Mr. Leisure:

Q. When the bids are opened you then designate what companies are entitled to the business on the basis of the bids?

A. Awards have been made to various cement companies on the basis of the service that a particular mill would be able to render to the State of North Carolina. In many instances mills have been so far removed from our State that they have not been included as one of the contracting companies.

Q. So that the result is, is it not, Mr. Betts, that companies would receive contracts for the requirements in certain designated counties?

A. No, we made no specific allocation of counties when a contract is made. A contract is made with cement companies for a certain specified amount to be delivered anywhere in the State of North Carolina that we may choose. However, it has been our practice to allocate projects to the various cement companies that would be closest to these projects, for several reasons.

One is that a contractor would be able to get his cement quicker.

Trial Examiner Norwood: Haven't you told us all that before, on the stand?

20224 The Witness: I believe that I did.

Trial Examiner Norwood: I think inasmuch as we have gone to so much trouble about these particular exhibits that Counsel might confine himself to matters not already testified to as to these documents, generally.

Mr. Leisure: I will endeavor to do so, Your Honor.

Mr. MacIntyre: If Your Honor please, direct examination of this witness took place at page 317, and cross-examination at page 381 covered the methods and policies of the State of North Carolina in its purchases of cement as testified to by this witness.

Trial Examiner Norwood: If there is any doubt on any of those questions, I have that digested. I can tell you in two minutes whether you have covered it or not.

By Mr. Leisure:

Q. When we interrupted you, Mr. Betts, you said there were three reasons, and I think you gave us one. Would

you go ahead and complete your answer, please. Would you like to have your answer read as far as you have gone?

The Witness: Yes.

Mr. Leisure: Would you read that, please?

(Answer read.)

A. One other reason is, as I stated before when I
20225 last appeared, was that we made an effort to co-operate with the cement companies in placing business that would give them the greatest net in order that some day they might be able to reduce the price of cement or help the State of North Carolina in some way in their dealing with the cement companies.

By Mr. Leisure:

Q. Now, in your experience, if you recall, Mr. Betts, have you ever requested the Penn-Dixie Company with a mill at Kingsport to ship at Portsmouth—I am starting with Camden, N. C.?

A. I couldn't answer that. It is a possibility that Penn-Dixie may have shipped some cement there and they may not.

Q. Do you have any knowledge of ever requesting them to?

A. No, not at that point.

Q. Do you have any knowledge of ever requesting them to ship from the Kingsport location to Elizabeth City, N. C.?

A. Not that I recall.

Q. Or Edenton?

A. No, I don't remember.

Q. Or to Tarboro, N. C.?

A. No.

Q. Or to Greenfield?

A. Not that I recall.

Mr. Wooden: Will you state what paper you were showing the witness?

Trial Examiner Norwood: What paper was that?

20226 Mr. Leisure: Well, the exhibit number is 411-A.

I am not necessarily using—I mean, I do not care about the exhibit, the question would be the same whether it was related to any exhibit or not.

I am merely referring to shipments by the Penn-Dixie Company from Kingsport mill to certain destinations—destined points.

By Mr. Leisure:

Q. And, if you had ever requested them to ship to those points, you would know about it, would you not, Mr. Betts?

A. I would if I examined the record. I could not keep all of those points in mind. I could go back to some of my records and see if we had ever shipped to those points.

Q. But you have testified, if you could choose a more favorably located mill, according to your practice, that would be what you would do?

A. Probably if it came from mills such as Lone Star of Norfolk, or Lehigh—

Q. Precisely.

A. —or in Lehigh Valley in Fordwick, on account of being closer to those points.

Mr. MacIntyre: If your Honor please, may we inquire of Mr. Leisure now, since he has brought up to the witness Exhibit 411-A, whether he intends to offer it as the Respondents' exhibit before the witness leaves the 20227 stand?

Mr. Leisure: You can ask it, Mr. MacIntyre, but I do not propose to take time to answer any such questions.

It has nothing to do with my questions, in any way.

By Mr. Leisure:

Q. Mr. Betts, in the letter which you refer to,—Exhibit 3101, which I think was from Mr. Wooden,—do you recall was that letter from Mr. Wooden or was it from you to Mr. Wooden, the one that he referred to this morning,—3101—

A. Will you let me look at it so I can answer that question?

Q. I do not know, just where it is here. This is it here (handing document to witness), 31—

A. (Witness refers to Commission's Exhibit 3100-A.) Document C-X-3100-A is a letter dated March 3, 1939, written by W. Z. Betts to Mr. Walter B. Wooden, attorney, Federal Trade Commission, Washington, D. C.

Q. And that was written, as you have testified, after you had received some kind of communication from Mr. Wooden, and after you testified here?

A. This letter was written after receipt of a telegram dated March 3, 1939, from Mr. Walter B. Wooden.

Q. (Showing document to witness.) And Exhibit 3101-A and B was written as the result of a request by Mr. Wooden?

A. (Witness refers to Commission's Exhibit 3101-A and B.) Documents 3101 A and 3101-B represent a letter dated March 9, 1939, written by W. Z. Betts to Mr. Walter B. Wooden, Attorney, Federal Trade Commission, in answer to his telegram of March 3, 1939.

Q. And does the same apply to Commission's Exhibit 3100-C and 31—what is that number?

A. G.

Q. —3100-G,—were those written at the request of Mr. Wooden by yourself (handing documents to witness)?

A. Documents—

Trial Examiner Norwood: You can just answer that yes or no, can you not?

The Witness: I will make an explanation there that C-X-3100-C is an explanatory note explaining the documents attached to my letter of March 3, 1939, which contained the information requested by Mr. Walter B. Wooden in his telegram of March 3, 1939.

20229 By Mr. Leisure:

Q. And it was written for that purpose to make that explanation?

A. He had requested certain information undoubtedly which we had in our files.

Q. Yes.

A. And which we already had in our files, which I thought required some little explanation in order that he might understand what it was.

Q. I see.

A. Which contained the information requested in this telegram of March 3, 1939.

Q. Was Commission's Exhibit 3063-A also written by yourself at the request of Mr. Wooden (showing document to witness)?

A. Exhibit C-X 3063-A is a copy of a certification that was prepared by me at the request of Mr. Walter B. Wooden, which he asked that it be attached to the papers which I was forwarding at his request.

Mr. Leisure: Thank you.

By Mr. Leisure:

Q. (Showing document to witness.) Now, as to Commission's Exhibit 3101-C, as I understood you, that is a tabulation prepared either by yourself or someone—

A. By my secretary.

Q. Yes, someone in your office.

20230 A. That's right.

Q. On basic data which you had at the time at your office?

A. Yes, which is a part of our permanent records, and the information that we carry all the time, and which we have carried on the lettings that are held by the State Highway and Public Works Commission.

Q. That, of course, has nothing to do with the exhibits that we are talking about here, the ones that have been offered in evidence. That is an entirely separate tabulation from these bids here, is that not true?

I am now referring to the ones Mr. Wooden marked this morning, Commission's Exhibits 3062-A to Z, down through 3092-A to U.

A. Do you mean this is separate from any bidding, you mean?

Q. That paper has nothing to do—

A. Oh, no.

Q. —with any of the rest of the papers in any way?

A. That is just some records that we keep of allocations that are made against contracts, to contractors, so that if a contractor should ask us, or anyone else, what contractor was going to receive, or has received, project number so and so, or who is the contractor, why, I want to know, and I want to know instantly, why, we would go to this record and we can see just who the contractor in project number so and so is, the number of barrels, date awarded, time limit, name of the cement company,

20231 shipping points, and prices, and so on,—just ready information about all our allocations, and project work, throughout the State of North Carolina.

Q. It is, in graphic form, a summary of chart or information for your convenience, which you used in your own office?

A. That's right.

Q. And does the same apply, Mr. Betts, to Exhibit—what is the number here?

A. (Witness referring to Commission's Exhibit 3100-H) C-X-3100-H.

Q. Does the same apply as to that?

A. Yes.

Mr. Leisure: I think that is all I have, Your Honor.

Mr. Zimmerman: No cross.

Redirect Examination by Mr. Wooden.

Q. Mr. Betts, do I understand that prior to the present year it was your practice to name the destinations, or not to name the destinations, on which you asked for bids on cement?

A. Prior to—

20232 A. Prior to this year we did not include in our requests for bids destinations other than basing points.

By Mr. Wooden:

Q. What do you mean by basing points?

A. The price of cement f.o.b. the mill is a basing point.

Q. Do you have any mills in North Carolina?

A. No cement mills in the State of North Carolina.

Cross Examination by Mr. Zimmerman.

20233 Q. You mean, Mr. Betts, that prior to 1939 it was the custom of your department to request and receive bids f.o.b. mill, and to buy cement on that basis?

A. No, we didn't buy cement on that basis. It was—

Q. Did you request bids on that basis?

A. No—may I have one of those contracts, one of the forms, so that I can answer the question.

Q. Just to refresh your recollection, I take it?

A. Yes.

Trial Examiner Norwood: I think these documents would show that.

Mr. Zimmerman: Well, he was asked a general question by Mr. Wooden which did not refer to the documents, and that was the purpose of my inquiry. I just wanted to be clear on it. On the other hand, I have no objection to the witness refreshing his recollection in any way he desires.

A. The base on which the State Highway and Public Works Commission requested bids on cement was that the prices per standard barrel of cement including packages delivered f.o.b. the destination on the various projects will be the best market prices bid by you on February 27, 1936, plus the freight from basing point to destination.

By Mr. Zimmerman:

Q. That is a matter of what we might call a des-
20234 tination cost?

A. That is the basis on which we call for cement under date of February 27, 1936.

Q. I see. And what was the custom how far back, to your knowledge?

A. I expect that would extend back some—

Q. All within your knowledge?

A. Yes. I just don't remember. I don't have all my record with me; some two or three years prior to this date.

Q. You mean prior to now or prior to 1936?

A. Prior to February 27, 1936.

Mr. Zimmerman: Thank you very much. I wanted to get that clear.

Trial Examiner Norwood: Counsel may state any objection to these pending exhibits because I expect to rule on them right now.

Mr. Wooden: In that connection I would like to ask you if the original bids are here, Mr. Leisure?

Mr. Leisure: They are here, Mr. Wooden.

Mr. Wooden: And the one that was missing from the photostats, 3074-A to L, may be accepted in the form of a photostat when it is located?

Mr. Leisure: Yes, and will you, at the same time, photostat the back of the exhibit that Mr. Withrow raised the point yesterday as not photostated?

20235 Mr. Wooden: All right.

Mr. Leisure: So that it can be offered at the same time.

Trial Examiner Norwood: What is that, the one with the time clock stamp on the back?

Mr. Withrow: There were a number of points that I raised in connection with them in regard to getting the photostats and they are all listed in the record.

Mr. Wooden: You don't have a photostat of 3074?

Mr. Withrow: I don't have it, no. I am sure we returned all of them. We checked them very carefully.

Mr. Leisure: We have only suggested we are willing to agree to accept photostats if they comply with what we think—that is, photostating the entire original.

Trial Examiner Norwood: I understand the stipulation.

Mr. Wooden: Your Honor, I would like to make the offer of the originals with the privilege of substituting photostats for them to be now agreed to or approved by Your Honor.

Trial Examiner Norwood: Are there any further objections to these exhibits?

20236 Mr. Leisure: Let me see the originals. I didn't know they were going to be offered. Just one second.

(Counsel examine documents.)

Trial Examiner Norwood: Respondents have stated at length their objections to all the new documents which are marked 3100-A to EE. I suppose the same objections would apply to those.

Mr. Leisure: Since the originals are being offered instead of the photostats may I ask the witness one question?

Trial Examiner Norwood: Certainly.

Mr. Leisure: I notice that these all have uniform brads here. Were these bradded after they left your office?

The Witness: They may have been bradded before they left my office in order to keep all the papers relating to any individual company bradded together. It may be that they have been taken out and another machine used and bradded back together after they were photostated, I don't know.

Mr. Leisure: They may have just been bradded together to show a group of papers in a certain file?

The Witness: When they left my office they should have been bradded together just like you have them there so that they wouldn't become loose or separated

20237 and would be in such order that anyone could examine them and have all the documents relating to any particular company together.

Mr. Leisure: Your Honor, I think we have stated our objections to most of these.

I don't understand why Mr. Wooden is offering the letters between him and Mr. Betts with regard to these exhibits. They unnecessarily encumber the record. They are not binding, of course, upon the Respondents in this case, and I don't think they should be offered.

As to the two tabulations where the supporting data is not there, we raise that objection; the supporting data has not been produced.

We restate all of the objections heretofore made to this group of exhibits.

Trial Examiner Norwood: Yes.

Mr. Wooden: Ordinarily I wouldn't have offered the letters to me by this witness, but I offer them now because it shows just what the circumstances were that Respondents' Counsel had knowledge of when they refused to agree Mr. Betts would identify these papers.

Mr. Leisure: That is not in issue in this case. They may satisfy Counsel's personal—

Trial Examiner Norwood: As I understand it they contain some explanatory matter regarding the exhibits?

20238 Mr. Wooden: Yes, they do.

Trial Examiner Norwood: And as to the two, then, accompanied by the supporting data; what numbers are they?

Mr. Leisure: Before we get to that, the two letters I am objecting to do not contain any explanatory matter of the exhibits so that the statement in the record which would indicate they do would not be correct with the letters. I am objecting to them because they do not have any explanatory material in them.

Trial Examiner Norwood: Let me see them.

Mr. Wooden: I think the letters do explain the material that is being transmitted by the letters and the certification.

Trial Examiner Norwood: The witness is on the stand here and testifies to the correctness of these, as I understand it.

Mr. Leisure: And, therefore, I don't see why we need self-serving declarations in the forms of letters between Counsel and his witness.

Mr. Wooden: I don't see what self-serving declarations there are in such a letter.

Trial Examiner Norwood: This 3101-A: You testified to the correctness of your statements in that letter. (handing document to the witness)?

20239 The Witness: Yes, sir; that is correct.

Trial Examiner Norwood: Also 3100-A?

The Witness: Yes, sir; that is correct.

(COM. EXS. 3100-A to 3100-EE, inclusive, and 3101-A and 3101-B were offered and received in evidence.)

Mr. Leisure: Yes, sir.

Trial Examiner Norwood: What supporting data should accompany this?

Mr. MacIntyre: If Your Honor please, this is the supporting data. It is the only record of its kind that is in evidence. It is the only record that carries any information that is in existence according to the testimony of the witness that is now on the stand.

Mr. Leisure: The supporting data from which it has been made is not in evidence, Your Honor.

Trial Examiner Norwood: This refers to the allocation of cement orders, does it not?

20240 (A document was handed to the witness.)

The Witness: These documents here represent the allocations of various projects on which contractors have been successful bidders, to the various cement companies.

Trial Examiner Norwood: That is the only record you have containing that information?

The Witness: We have additional correspondence in our files in which we advise these contractors whom they are to purchase cement from.

Trial Examiner Norwood: Is that the only official record you have, the only office record?

The Witness: I probably could dig up some additional information that would show that but this is an office record of that information.

20241 Trial Examiner Norwood: I shall overrule the objections and receive the exhibits as marked.

Mr. Leisure: Your Honor is clear, from the witness answers, he made this up from material he has in his office. He didn't make it up out of his head.

Trial Examiner Norwood: Is that correct? Did you make that up from material that is in the office?

The Witness: This is the first record we make up of allocation which is a permanent file and record of the State Highway and Public Works Commission.

Trial Examiner Norwood: This is similar to the case of tabulations of bids?

Mr. Leisure: No, but he gets this material. He doesn't get it out of his mind.

Trial Examiner Norwood: He gets that from the records they have here.

Mr. MacIntyre: We submit from the witness' last testimony that the information as shown from his record and from his experience and the experience of his office in the handling of contracts and allocating contracts; it has come from his experience in his office.

Trial Examiner Norwood: I think that is clear; they are received as marked, 3101-C to Y, inclusive.

Is there anything further to say about those originals there? I think we have gone into that fully.

20242 (COM. EXS. 3062-A to 3062-Z, inclusive; 3063-A to 3063-GG, inclusive; 3064-A to 3064-P, inclusive; 3065-A to 3065-Z, inclusive; 3066-A to 3066-S, inclusive; 3067-A to 3067-AA, inclusive; 3068-A to 3068-U, inclusive; 3069-A to 3069-GG, inclusive; 3070-A to 3070-S, inclusive; 3071-A to 3071-BB, inclusive; 3072-A to 3072-PP, inclusive; 3073-A to 3073-Q, inclusive; 3074-A to 3074-L, inclusive; 3075-A-K, 3075-M-T, inclusive; 3076-A to 3076-G, inclusive; 3077-A to 3077-X, inclusive; 3078-A to 3078-V, inclusive; 3079-A to 3079-J, inclusive; 3080-A to 3080-L, inclusive; 3081-A to 3081-V, inclusive; 3082-A to 3082-M, inclusive; 3083-A to 3083-R, inclusive; 3084-A to 3084-KK, inclusive; 3085-A to 3085-F, inclusive; 3086-A to 3086-E, inclusive; 3087-A to 3087-I, inclusive; 3088-A to 3088-G, inclusive; 3089-A to 3089-F, inclusive; 3090-A to 3090-H, inclusive; 3091-A to 3091-F, inclusive; 3092-A-E, 3092-G-U, inclusive, were offered and received in evidence.)

Mr. Leisure: Before we get on to another subject, there were two tabulations which we objected to, and the
20243 second tabulation shows on its face that it is not an original record, it is a recapitulation of something else in the office.

Trial Examiner Norwood: What is the number of it?

Mr. Leisure: I beg your pardon?

Trial Examiner Norwood: What is the number of it?

Mr. Leisure: 3100-H, is it not, Mr. Betts (handing paper to witness)?

Trial Examiner Norwood: I beg Counsel's pardon. I thought you had shown me all—

The Witness: This record is C-X-3100-H, through and including 3100-S, and 3100-T, through and including 3100-EE, is a record of the actual shipments of cement by various cement companies to various projects throughout the State of North Carolina on a monthly basis for a period of 12 months.

Trial Examiner Norwood: Is that in the original record?

The Witness: And is a recapitulation of a Cardex card record in our office showing the car number, number of barrels, and date shipped of each car.

By Mr. Leisure:

Q. And Exhibit 3101-C, where shipping points and prices are set up is taken also from your record?

A. No, sir. This is an original record that goes 20244 up from my instructions to my secretary, as to whom these various projects should be awarded.

Q. But you get prices from somewhere, do you not, Mr. Betts—you do not do it yourself, do you?

A. No, I have a very efficient and capable traffic manager.

Q. Who gives you those prices?

A. Yes.

Q. Precisely.

Trial Examiner Norwood: Is that 3100-H, that last one he asked you about?

The Witness: This is 3101-C through 3101-Y.

Trial Examiner Norwood: Well, the last one there that he gave you.

The Witness: That is the last one he brought over here.

Trial Examiner Norwood: No, no. It was a typewritten copy.

The Witness: That is H (handing document to the Trial Examiner).

Trial Examiner Norwood: Well, 3100-H through to S

Mr. MacIntyre: Before Your Honor rules on that, let us make this observation with respect to that document, based on the witness' testimony. There are three types

of records ordinarily kept as original records, by any organization, including this Highway Department, as
20245 I think we can take common knowledge of—I mean common note of.

Mr. Leisure: May we have that in the form of testimony?

Mr. MacIntyre: Yes.

Trial Examiner Norwood: I think you will have to ask the witness to tell us about these points.

Mr. MacIntyre: I am going to come to the witness' testimony before I mention this document.

Mr. Leisure: I object.

Mr. MacIntyre: I am coming to that now.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

20246 Trial Examiner Norwood: On the record.

Do you say that these documents here, Commission's Exhibits 3100-H to S, inclusive, are original records?

The Witness: They are original records, in so far as the information that they contain,—I require my secretary to furnish me with a monthly report—.

Trial Examiner Norwood: Yes.

The Witness: Of the actual shipments of cement.

Trial Examiner Norwood: Yes.

The Witness: To the various projects by various companies throughout the State of North Carolina, each month.

She obtains that information from a Cardex file. We keep a Cardex file on each project on which we show the project number, the name of the contractors, if there are two contracts on the same project, the destination to which cement is being shipped on that particular project, the number of barrels involved, the project numbers, and on this card, on the reverse side, is a line on which we keep each car number that is shipped.

Trial Examiner Norwood: Yes.

The Witness: The car number, the destination and price, and the number of barrels, in order to check the invoices when they are received from the various cement
20247 companies, and this record here is one that is furnished me at the end of each month by my secretary to acquaint me with the actual shipments of the various cement companies.

Trial Examiner Norwood: Can you testify as to the correctness of these?

The Witness: Yes, sir; she is a right capable secretary.

Trial Examiner Norwood: The objection is overruled; received as marked.

Call your next witness.

Mr. Wooden: Your Honor, I would like to inquire of Respondents' Counsel whether they are willing to stipulate that if Mr. C. H. Garrity of the Tennessee Valley Authority were recalled as a witness he would identify documents marked for identification as Commission's Exhibits 3111-E to 3111-J as authentic reproductions—photographic reproductions—of public vouchers for transportation of cement on Government's bills-of-lading on the transportation of cement, respectively, cement being shipped to the Tennessee Valley Authority, as indicated by Mr. Garrity in a letter addressed to me and which was submitted to Counsel and marked Commission's Exhibits 3111-A and B, for identification.

20248 Trial Examiner Norwood: You are asking him to agree, so you will have to—

Mr. Wooden: I am asking him to agree on the identification of papers; that is all. Now he wants me to discuss the relevancy of them.

Mr. Leisure: The answer is no, Mr. Wooden.

H. O. Warner was thereupon recalled as a witness for the Commission, and testified further as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Warner, when you were on the stand
20249 before I believe you testified that you had been sales manager of the Colorado Portland Cement Company since 1919, is that correct?

A. Yes, sir.

Q. Had you been with the company prior to that time?

A. Yes, sir, I came with the company in 1915.

Q. In what capacity?

A. Salesman.

Q. Did you go from salesman to general sales manager?

A. Assistant sales manager and then sales manager.
Q. When did you become assistant sales manager?
A. 1916.
Q. Who was your superior?
A. At that time?
Q. Yes.
A. Mr. Clarke M. Moore.

The witness identified Com. Ex. 3209 C as a letterhead of the Colorado Portland Cement Company and said "yes, sir," the signature looks like it might be Mr. Clarke M. Moore's signature, General Sales Manager;
20250 Com. Ex. 3216 C, containing a letterhead and signature of Clarke M. Moore, could be Mr. Moore's signature. "Q. You were familiar with it at the time? A. At that time I was; yes, sir". Of course Mr. Moore left "our" company in 1919, and he died in 1923 and it has been a long time but that—it might be his signature; it could be it. At that time the witness was familiar with it. The witness did not know Mr. Burke but he believes there was a man for a short time by that name who was connected with the Three Forks Portland Cement Company. He thinks that Mr. Burke was Sales Manager of the company for a very short time; the witness was shown Com. Ex. 3210 A and B, and asked (whether) he recognizes those as containing the regular letterhead of the Colorado Portland Cement Company. He said it has
20251 been many years since we have had that letterhead, but that could have been our old letterhead. Of course, this letter is dated in 1915. That is a long time ago. That was the time that Mr. Clarke M. Moore was his company's sales manager, and that letter antidates the witness' connection with the company; the witness was shown Com. Ex. 3209 A and B, and asked (whether) he recognizes the letterhead on both of those sheets as the letterhead of the Colorado Portland Cement Company. He said that could have been our old letterhead; when he says "could have been", he means that he does not recall that particular letterhead. But it has been a long time since any letterhead with a picture of the plant has been used. The witness recognizes the names of the officers appearing on the letterhead.

20252 Mr. Leisnre: Whether he recognizes the names of the officers wouldn't help identify it.

If the letter was written, as just shown to the witness, if it was prior to his connection with the company—

Trial Examiner Norwood: He can state whether or not he recognizes those names as former officers of
20252 the company, can he not?

Mr. Leisure: No, I don't think so; just because of the fact it is on the letter doesn't prove it.

That doesn't prove they were officers at that time.

Mr. Wooden: I am asking the witness about it, of course.

Trial Examiner Norwood: He is giving what information he can. I am not saying that would be any identification, any recognition, there, of this, would be something. He could know who the former officers of this company were without being connected with the company.

The Witness: I think at one time these men were officers of our company, but whether they were at this time, or not, I can't say.

Trial Examiner Norwood: As shown on the letterhead?

The Witness: Yes.

Mr. Wooden: Your Honor, I will offer in evidence at this time Exhibits marked and identified by the witness as Commission's Exhibits 3209-A, B, and C, and 3210-A, B, and C. (Handing documents to Mr. Leisure.)

Trial Examiner Norwood: Was there other identification of these?

Mr. Wooden: No, Your Honor.

Trial Examiner Norwood: Where did they come from?

Mr. Wooden: The particular papers are photo-
20253 graphs of the original papers that are in the files of the Department of Justice. The witness has identified the signature.

Examination on the Voir Dire by Mr. Leisure.

Q. Mr. Warner, you are not a lawyer and when you say 'it could be a signature', what we really want to know is have you ever been personally present, and seen Mr. Moore sign his name? Do you know his signature when you see it?

20254 Q. Do you know his signature when you see it?

A. Well, I did at one time. Of course, Mr. Moore, I haven't seen for 20 years almost—18 years, anyway. He died in 1923, and he had but one arm, and his

signature was a cramped signature, and it did vary some, but I haven't any reason to—

Trial Examiner Norwood: A little louder, please.

A. (Resumed) I haven't any reason to doubt it, if someone says that it is.

By Mr. Leisure:

Q. Yes, but no one has said that it is, and I merely want to find out whether you are able now after this period of some 13 or 14 years to look at that signature and say in your honest opinion that is Mr. Moore's signature. If you can, we want you to say so, and if you cannot, we do not want you to guess at it, just because it happens to be a signature.

A. Well, Mr. Leisure, I haven't any reason to doubt it.

Q. That is not the question.

A. I would say it looks like—

Q. It is a question of whether or not you recognize the signature when you see it just as you would recognize Mr. Moore when you saw him.

Trial Examiner Norwood: Wait a moment, wait a moment, let the witness complete his answer.

The Witness: Beg your pardon?

Trial Examiner Norwood: Complete your answer
2025 that you started.

The Witness: How far did I get?

Trial Examiner Norwood: Read it.

(Answer read as follows:

"A. I would say it looks like—")

Trial Examiner Norwood: Does that look like his signature to you?

The Witness: Yes, sir; it looks very much like his signature as I recall it.

By Mr. Leisure:

Q. And the other one, also, does that look like his signature as you recall it? I am now referring to Commission's Exhibit 3210-A. Does that, to the best of your recollection, look like his signature as you recollect it (indicating)?

A. That's this one here, Mr. Leisure (indicating)?

Q. Yes.

A. It looks like the same signature; yes, sir.

2028 Trial Examiner Norwood: Is there anything in the record showing the connection between these two

companies at Three Forks and the Colorado Portland Cement Company?

Mr. Wooden: Yes, Your Honor. They are both parts of the group of Boetcher Companies or Ideal Companies and both are named as Respondents in the present proceedings.

Trial Examiner Norwood: In other words, under the same ownership?

Mr. Wooden: The witness can tell better than I. They are, at least, under the same general management and to some extent under the same ownership, I would say. Just how far, I don't know.

Mr. Zimmerman: I have glanced at the documents and it seems to me they are inter-company communications back in the year 1915 which certainly, in no wise, involve or can, in any way, be connected with the Respondent Marquette or any other Respondent in this case.

20259 Mr. Wooden: Their relevancy and materiality is apparent, I think, Your Honor, on the face of the papers. They show briefly the circumstances and conditions under which the basing point system was extended and established in the State of Washington and in Montana and the Lehigh Company and other of the principal Respondents are referred to in that connection.

Mr. Zimmerman: Well, but doesn't that rather tend to show—not that I want to argue that too much, but doesn't that rather tend to show that the basing point system he refers to, whatever it is, that is described in there, long antedated the Respondent Institute here and any association with the present Respondents in that Institute?

Trial Examiner Norwood: You wouldn't object to that, would you?

Mr. Zimmerman: I am not sure, but what I would object to is any irrelevant matter. I think I should, if the matter is wholly irrelevant.

I don't know any reason why we should go into irrelevant matter.

20260 Mr. Wooden: We certainly never claimed that the basing point system began with the Cement Institute; quite the contrary.

Mr. Zimmerman: I have always claimed the cement companies never used the basing point system regardless of the careless use of that term.

I mean by that that there is no showing they ever used

it as was used in steel and that is what the basing point system is, is the system of pricing originated in the steel industry and there followed.

Trial Examiner Norwood: I think this has a certain historical value. It appears to pass along price information and price instructions from one company to the other, there, which is probably not unlawful if it is from one company to another—

Mr. Zimmerman: —subsidiary?

Trial Examiner Norwood: —subsidiary.

Mr. Wooden: It states, Your Honor, it is being done under agreement with the Lehigh Company.

Mr. Zimmerman: Again that wouldn't be pertinent to any supposed agreement as charged in this complaint here.

Trial Examiner Norwood: I think it might come in for whatever value it might have.

The objections are overruled and they are received
20261 as marked.

(COM. EXS. 3209-A, 3209-B, 3209-C, 3210-A, 3210-B, and 3210-C were offered and received in evidence.)

20275 (COM. EXS. 3206, 3207-A, 3207-B and 3208 were offered and received in evidence.)

20277 Your Honor, I have here a paper marked for identification as Commission's Exhibit 3211-A, B, and C, it being a photograph of an original letter purporting to be signed by Charles Horner of the Kosmos Portland Cement Company and addressed to William S. Speed of the Louisville Portland Cement Company and dated July 5, 1919.

This paper is a photograph of an original in the files of the Department of Justice and I am asking Counsel for the Respondents to stipulate that it is an authentic document.

20278 Mr. Zimmerman: Well, as I understand, Counsel's statement is the only thing there is in the record which indicates that it is a photograph of an original and as to where the original is and so far as I am concerned I can see no reason why we should take a statement of Counsel concerning matters which I am sure he doesn't have first-hand knowledge of.

Mr. Wooden: Regardless of that, can't it be checked and stipulated that that is an authentic record?

Mr. Zimmerman: I don't think Counsel should offer

a statement where he himself is not in a position to give us his personal assurance of it.

Mr. Leisure: Your Honor, I, of course, don't know anything about the letter. It is produced here before me at this time after this case has been going as many months as it has, a letter going back to 1919, purporting to be signed by Mr. Horner and Mr. Horner has been on the witness stand.

Mr. Wooden: We didn't have that letter at that time.

Mr. Leisure: I will take it and read it and consider it, if Your Honor wants me to, but I can't pass on it now.

Mr. Wooden: I had always understood Mr. Leisure said he would be glad to check on the authenticity of
20279 documents purporting to have been written or signed by Respondents.

Trial Examiner Norwood: He proposes to take this and look it over.

Mr. Zimmerman: I can't do that and I am not going to undertake to do it and I am not going to ask anybody to do it for me.

20288

Washington, D. C.,
April 28, 1939.

20301 (COM. EXS. 2450-A, 2450-B, 2450-C, 2450-D,
2450-E, 2450-F, 2450-G, 2450-H, 2450-I, 2450-J,
2450-K, 2450-L, 2450-M, 2450-N, 2450-O, 2450-P,
20302 2450-Q, 2450-R, 2450-S, 2450-T, 2450-U, 2450-V,
2450-W, 2450-X, 2450-Y, 2450-Z, 2450-2A 2450-2B
2450-2C, 2450-2D, 2450-2F, 2450-2G, 2450-2-O, 2450-2P,
2450-2Q, 2450-2R, 2450-2S, 2450-2T, 2450-2U, 2450-2V,
2450-2W, 2450-2X, 2450-2Y, 2450-2Z, 2450-3A, 2450-3D,
2450-3E, 2450-3F, 2450-3G, 2450-3H, 2450-3I, 2450-3J,
2450-3K, 2450-3L, 2450-3M, 2450-3N, 2450-3-O, 2450-3P,
2450-3Q, 2450-3R, 2450-3S, 2450-3T, 2450-3U, 2450-3V,
2450-3W, 2450-3X, 2450-3Y, 2450-3Z, 2450-4A, 2450-4B,
2450-4C, 2450-4D, 2450-4E, 2450-4F, 2450-4G, 2450-4H,
2450-4I, 2450-4J, 2450-4K, 2450-4L, 2450-4M, 2450-4N,
2450-4-O, 2450-4P, 2450-4Q, 2450-4T, 2450-4U, 2450-4V,
2450-4Y, 2450-4Z, 2450-5A, 2450-5B, 2450-5C,
20303 2450-5D, 2450-5E, 2450-5F, 2450-5G, 2450-5L,
2450-5M, 2450-5N, 2450-5-O, 2450-5P, 2450-5Q,
2450-5R, 2450-5S, 2450-5T, 2450-5U, 2450-5V, 2450-5W,
2450-5X, 2450-5Y, 2450-5Z, 2450-6A, 2450-6B, 2450-6C,

2450-6D, 2450-6E, 2450-6F, 2450-6G, 2450-6H, 2450-6I, 2450-6J, 2450-6K, 2450-6L, 2450-6M, 2450-6N, 2450-6-O, 2450-6P, 2450-6Q, 2450-6R, 2450-6S, 2450-6T, 2450-6U, 2450-6V, 2450-6W, 2450-6X, 2450-6Y, 2450-6Z, 2450-7A, 2450-7B, 2450-7C, 2450-7D, 2450-7E, 2450-7F, 2450-7G, 2450-7H, 2450-7I, 2450-7J, 2450-7K, 2450-7L, 2450-7M, 2450-7N, 2450-7-O, 2450-7P, 2450-7Q, 2450-7R, 2450-7S, 2450-7T, 2450-7U, 2450-7V, 2450-7W, 2450-7X, 2450-7Y, 2450-7Z, 2450-8A, 2450-8B, 2450-8C, 2450-8D,
20304 2450-8E, 2450-8F, 2450-8G, 2450-8H, 2450-8I, 2450-8J, 2450-8K, 2450-8L, 2450-8M, 2450-8N, 2450-8-O, 2450-8P, 2450-8Q, 2450-8R, 2450-8S, 2450-8T, 2450-8U, 2450-8V, 2450-8W, 2450-8X, 2450-9B, 2450-9C, 2450-9D, 2450-9E, 2450-9F, 2450-9G, 2450-9H, 2450-9I, 2450-9J, 2450-9K, 2450-9L, 2450-9N, 2450-9-O, 2450-9P, 2450-9Q, 2450-9R, 2450-9S, 2450-9T, 2450-9U, 2450-9V, 2450-9W, 2450-10D, 2450-10E, 2450-10F, 2450-10H, 2450-10I, 2450-10J, 2450-10K, 2450-10L, 2450-10M, 2450-10N, 2450-10-O, 2450-10P, 2450-10S, 2450-10T, 2450-10U, 2450-10V, 2450-10W, 2450-10Z, 2450-11A, 2450-11B, 2450-11C, 2450-11D, 2450-11H, 2450-11I, 2450-11J, 2450-11K, 2450-11L, 2450-11Q, 2450-11R, 2450-11S, 2450-11T, 2450-11U, 2450-11V, 2450-11W, 2450-11X,
20305 2450-11Y, 2450-11Z, 2450-12A, 2450-12B, 2450-12G, 2450-12H, 2450-12I, 2450-12J, 2450-12K, 2450-12L, 2450-12-O, 2450-12P, 2450-12Q, 2450-12R, 2450-12S, 2450-12T, 2450-12U, 2450-12V, 2450-13E, 2450-13F, 2450-13G, 2450-13H, 2450-13I, 2450-13J, 2450-13K, 2450-13L, 2450-13-O, 2450-13P, 2450-13Q, 2450-13R, 2450-13S, 2450-13T, 2450-13U, 2450-13V, 2450-13W, 2450-13X, 2450-13Y, 2450-13Z, 2450-14A, 2450-14B, 2450-14C, 2450-14D, 2450-14E, 2450-14F, 2450-14G, 2450-14H, 2450-14I, 2450-14J, 2450-14K, 2450-14L, 2450-14M, 2450-14N, 2450-14O 2450-14P, 2450-14Q, 2450-14R, 2450-14S, 2450-14T, 2450-14U, 2450-14V, 2450-14W, 2450-14X, 2450-15C, 2450-15D, 2450-15M, 2450-15Q were received in evidence.)

20307 Mr. MacIntyre: If Your Honor please, we have one further group of exhibits we would like to refer to at this time. That is the group which has heretofore been marked for identification and received in
20308 evidence as Commission's Exhibit 1043-A to 5H, with one or two exceptions, in that group.

You will note that an order of the Commission has been to the effect that Commission's Counsel should secure the best available documentary record of the contents contained in such exhibits in so far as it was possible to secure available documentary record.

Due diligence has been exercised to comply with that order. The evidence is in the record in the form of a subpoena duces tecum for documents that were not produced. It is for original documents that were not produced and otherwise.

Mr. Brick: Is this a form of testimony, Your Honor?

Trial Examiner Norwood: Wait a minute.

Mr. MacIntyre: Respecting certain instances where original documents have not been produced. I believe that is all that is necessary to say on that matter so we now ask that since we have in many instances duplicated some typewritten copies and other types of copies with certain original documents, that you permit us at this time to withdraw from the record 1043-C, D, and E, P, U, V, W, Y, 2C, 2G, 2H, 2-I, 2K, 2M, 2N, 2-O, 2R, 2S, 2T, 2Y, 3E, 3F, 3G, 3H, 3-I, 3J, 3K, 3L, 3M, 3N, 3P, 3R, 3W, 3X, 3Y, 4A, 4B, 4C, 4D, 4E, 4F, 4G, 4L, 4M, 4N, 4-O, 4P, 4Y,
20309 4Z, 5A, 5B, 5C, 5D, and 5F, and retain in evidence all of the others of the group 1043 which heretofore have been received.

Trial Examiner Norwood: They are already in evidence?

Mr. MacIntyre: Yes, they are in evidence.

Trial Examiner Norwood: Motion to withdraw the sublettered exhibits specified is allowed.

(Thereupon the documents heretofore marked and received in evidence as Commission's Exhibits Nos. 1043-C, 1043-D, 1043-E, 1043-P, 1043-U, 1043-V, 1043-W, 1043-Y, 1043-2C, 1043-2G, 1043-2H, 1043-2-I, 1043-2K, 1043-2M, 1043-2N, 1043-2-O, 1043-2R, 1043-2S, 1043-2T, 1043-2Y, 1043-3E, 1043-3F, 1043-3G, 1043-3H, 1043-3-I, 1043-3J, 1043-3K, 1043-3L, 1043-3M, 1043-3N, 1043-3P, 1043-3R, 1043-3W, 1043-3X, 1043-3Y, 1043-4A, 1043-4B, 1043-4C, 1043-4D, 1043-4E, 1043-4F, 1043-4G, 1043-4L, 1043-4M, 1043-4N, 1043-4O, 1043-4P, 1043-4Y, 1043-4Z, 1043-5A, 1043-5B, 1043-5C, 1043-5D, and 5-F were withdrawn.)

Mr. Wooden: Your Honor, with reference to Commission's Exhibits 3204, 3205-A to E, inclusive, I would like to direct Your Honor's attention to Exhibit 1270-B to J, inclusive, and particularly, to 1270-C in which the status

and relevancy of Mr. Mallory's ratings or capacity is
20310 very clearly set forth by Mr. Jennings who was on
the executive board of the Institute in that middle
west territory and I mention that in reply to the contention
that Mr. Mallory's rated capacities are purely a personal
thing with him.

Mr. Brick: What is the day of that letter, Mr. Wooden, please?

Mr. Wooden: January 10, 1930, is the actual date. January 10, 1929 appears here, but—

Mr. Brick: Does the record show Mr. Mallory was in the employ of the Institute at that time?

Mr. Wooden: No.

Mr. Brick: Doesn't that answer the question?

Mr. Wooden: No.

Trial Examiner Norwood: Let Counsel finish his statement.

Mr. Wooden: The writer of the letter says he was the Institute's statistician and we know what the facts are. It is a matter of not the substance but the technical relation of Mr. Mallory to the Institute.

Trial Examiner Norwood: You mean that shows Mr. Mallory was an employee of the Respondents at the time he made these recent statements?

Mr. Wooden: No. Mr. Mallory's appearance here as a witness would show that; that he made these things up but
the status of his rated capacities is the point I am
20311 addressing myself to.

Of course, I realize Your Honor's difficulty seems to be with the question of whether these documents submitted by Mr. Mallory through Counsel could be accepted as authentic.

Trial Examiner Norwood: Could be accepted in evidence.

Mr. Wooden: Yes; as authentic. I thought that was the difficulty; not their relevancy and materiality.

Trial Examiner Norwood: I rejected them solely on the ground of their identification.

Mr. Wooden: That is what I understood.

Trial Examiner Norwood: And presentation in evidence.

Mr. Wooden: On the ground of insufficient identification; as I understood.

Trial Examiner Norwood: Well, it is the insufficient status as evidence.

Mr. Zimmerman: These are not merely figures on capacity, either, if Your Honor please.

Mr. Wooden: The exhibits I referred to were.

Mr. Zimmerman: What you laid down here on the table, and what I picked up and supposed you were referring to surely doesn't refer to capacity.

20312 Mr. Wooden: I didn't refer to those—

Mr. Zimmerman: And this letter which you have handed me as a further basis for your contention seems to be dated January 10, 1929, is that correct?

20313 Mr. Wooden: It is January 10, 1930,—it shows there as 1929, but the—

Mr. Zimmerman: Oh, I see.

Mr. Wooden: —but the calendar showed it should have been for 1930.

Mr. Zimmerman: What shows it?

Mr. Wooden: The testimony of Mr. Jennings and the calendar.

Mr. Zimmerman: Oh.

Mr. Wooden: In other words, that was Friday.

Mr. Zimmerman: Whether it was 1929 or 1930, it is at a time when Mr. Mallory was not employed by the Institute; is that correct?

Mr. Wooden: He was employed by a number of Respondent members.

Mr. Zimmerman: You mean—

Mr. Wooden: Not on the same statistics.

Mr. Zimmerman: You say they subscribed for his services?

Mr. Wooden: Yes, that is what I say.

Mr. Zimmerman: I see.

Mr. Smith: Your Honor, let me add, whatever might have been the status of Mr. Mallory when the exhibit just referred to was written, the Exhibits 3202 and 3204, was under date of April 1929. So far as the Huron Port-
20314 land Cement Company was concerned, on that date it was not a member of the Institute, and any statement of Mr. Mallory could not in any way bind it.

Mr. Zimmerman: That, of course, applies to Marquette, too. Its separation was somewhat prior to Huron's.

Mr. Smith: That date.

Mr. Wooden: The exhibit gives figures for 1936, 1937, and 1938.

Mr. Zimmerman: Yes, and at a time when certainly Marquette had furnished no figures whatsoever, and it could not have included them, and it could not be correct, because there were other cement companies that were not included.

Trial Examiner Norwood: Is Counsel referring to that for what purpose?

Mr. Wooden: To show Your Honor, if I can, the relevancy and materiality of the papers that were proffered under Commission's Exhibit 3204—

Mr. Zimmerman: Still does not—

Mr. Wooden: —and 3205.

Trial Examiner Norwood: I think I stated very clearly that I thought that they were relevant and material.

Mr. Zimmerman: You did.

20315 Mr. Wooden: I also—

Trial Examiner Norwood: But they are not presented here in a way that I would be justified in receiving them in evidence in the case. If somebody comes in and swears to them and identifies them—

Mr. Wooden: Your Honor, this is a witness employed by the Respondent Institute, who, while he was on the stand, was requested to supply this information.

Trial Examiner Norwood: Yes.

Mr. Wooden: He now supplied it.

Mr. Leisure: We went all over this yesterday.

Mr. Wooden: I know.

Mr. Leisure: We are simply going over the same ground again today, Your Honor.

Mr. Zimmerman: Yes.

Mr. Wooden: All right, I have my exception.

I want to ask Mr. MacIntyre to take the stand for a moment or two.

Trial Examiner Norwood: Everett MacIntyre, recalled.

EVERETT H. MacINTYRE was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Mr. Withrow: Your Honor, I would like—

20316 *Direct Examination by Mr. Wooden.*

Q. Mr. MacIntyre, I am showing you papers that were marked for identification as Commission's Exhibits 3112 and 3113 (indicating); will you tell us what you know about the source and origin of those papers?

A. During the latter part of June, 1934, I visited Mr. Mallory's office in New York City, and questioned him concerning proposed plans of allocation of business in the cement industry, and he discussed with me at the time the so-called Mallory plan, and I believe he called one No. 1 to distinguish it from the Mallory plan, and his plan No. 1, and the Mallory plan.

I then asked him to please furnish me with all information, record information, that he had that he had used in his consideration of the formulation and discussion of those two plans with the members of the industry.

Mr. Mallory told me that he did not feel free to turn that information over to me at the time before he had discussed its probable turning over to the Federal Trade Commission with Mr. Conn, President of The Cement Institute, and with other members of the committees for allocation of business. He said after he had discussed that he would let me hear from him.

20317 Shortly after that, I believe it was on the 11th of July, 1934, Mr. Mallory came to my office in the Federal Trade Commission in Washington, brought in a roll of papers, and he said he had secured permission from members of the Allocation Committee for The Cement Institute, and Mr. Conn, president of The Cement Institute, to turn these papers over to me.

Among those papers were documents of which Commission's Exhibits, for identification, 3113 and 3112 are photostats (handing documents to Mr. Wooden).

Mr. Wooden: Your Honor, in view of this supplementary identification, I wish to make a new offer of these Exhibits 3112 and 3113.

Mr. Zimmerman: Where are the originals?

Mr. Wooden: I do not know.

By Mr. Wooden:

Q. Will you tell us about the originals, Mr. MacIntyre?

A. It is my recollection the originals were returned to Mr. Mallory. I am not absolutely certain of that, but that is the best of my recollection at this time.

Trial Examiner Norwood: Who delivered those papers to you?

The Witness: Mr. W. S. Mallory, statistician for The Cement Institute.

Trial Examiner Norwood: And you had made the request to whom?

The Witness: To him, in The Cement Institute
20318 offices in New York, and he told me then that he would supply them as soon as he could get permission from the president of The Cement Institute and other members of The Cement Institute's Committee on Allocation of Business.

20319 Trial Examiner Norwood: On the record.

Any objections?

Mr. Leisure: Your Honor pleases, we object to both of these exhibits as utterly incompetent, irrelevant, and immaterial; no proper basis whatever having been laid for their introduction in evidence.

Mr. Zimmerman: May I add to that objection, if the Examiner please, this:

Further objection is that these are not and do not pretend to be the papers that were turned over by Mr. Mallory; there is no proper foundation laid for the identification of these documents; there is no showing as to even what the documents are, or what they were taken from, or anything which connects them up properly with any Respondent in the case.

Trial Examiner Norwood: Do you have evidence in this case from which things like these might be made, graphs like these might be made, without producing these graphs now?

Mr. Wooden: No, Your Honor, I do not think there is. This is the work already done by the Institute's statistician.

Mr. Zimmerman: No showing of that at all.

Trial Examiner Norwood: Now as to this proffer here of Exhibits 3112 and 3113 as well as those as the
20320 two documents that were sent here by Mr. Mallory —I think they are relevant and material.

Mr. Zimmerman: Well, regardless of that, there is no

proper identification of them; they are not the documents that were delivered by Mr. Mallory.

Trial Examiner Norwood: It seems to me it might be of sufficient importance to get this witness here to state that those are the things that he made, and allow the Counsel for the Respondents to cross-examine him as to his method of making them, and so forth.

Mr. Zimmerman: But he did not make them, and they don't pretend that he made them.

Mr. Wooden: I do not think that the Counsel for the Respondents have the slightest doubt in their minds but that Mr. Mallory is the author of those documents.

Mr. Zimmerman: Do you think that Mr. Mallory made the map?

Mr. Wooden: No.

Mr. Zimmerman: Or the other thing?

Mr. Wooden: He was the author of them. It carries his name.

Mr. Zimmerman: He did not do that.

Trial Examiner Norwood: If Counsel are standing on their rights to have the proof in the regular way, I think that Counsel for the Commission is—

26321 Mr. Wooden: It is just a question with me, Your Honor, whether I will stand on my exception.

Trial Examiner Norwood: Yes.

Mr. Wooden: And have the Commission pass on it, or go to the trouble of re-calling Mr. Mallory.

Mr. Zimmerman: When will we be informed?

Mr. Wooden: Pardon?

Mr. Zimmerman: When will we learn?

Mr. Wooden: You will learn today, of course.

Mr. Zimmerman: I see. Before we close?

Trial Examiner Norwood: Anything further?

Mr. Zimmerman: Is Mr. Rice here?

Mr. Wooden: I do not see him.

Your Honor, in connection with the offer made of certain exhibits from the official printed transcript of the record in the Old Cement Manufacturers' Protective Association case, I have here now an official certification from the Clerk of the Supreme Court of the United States to this being the true copy of the official record on file there (handing document to the Trial Examiner).

Trial Examiner Norwood: Yes.

Mr. Wooden: And I suggest that if the portions of the record which I offered be admitted that consent be given to making copies of those numbered portions for inclu-

sion in this record, and discarding the remainder
20322 of the printed record.

Trial Examiner Norwood: Yes.

Mr. Leisure: Could I have that proffer read to me?

Trial Examiner Norwood: Yes, read it, please.

(Statement by Mr. Wooden read by the Reporter.)

Mr. Zimmerman: The matter stands exactly where it did yesterday. This certification merely is that this is a true copy of the record as printed for use in the Supreme Court. It did not purport to be or was it required to be a complete record of the proceedings or the evidence given in the cause. It is not, and does not purport to be that, nor does this certificate state that it is.

Counsel missed our point yesterday entirely. It was not a matter of having any certificate of the Supreme Court that this was the partial record or abstract in narrative form of certain proceedings that were prepared by Counsel to perfect an appeal in the Supreme Court.

Trial Examiner Norwood: Well, inasmuch as that is certified to be part of the record in that case, it is apparent that that matter was filed by the—

Mr. Zimmerman: By certain attorneys on behalf of certain clients.

Trial Examiner Norwood: Yes, exactly.

Mr. Zimmerman: Who did not represent Respond-
20323 ents in this cause, certainly not our Respondent, the Marquette Company here, or perhaps a large majority of the other Respondents, including the Institute.

Trial Examiner Norwood: It is only against four of them, I think.

Mr. Zimmerman: No, sir; I am sorry, but he offered it as against all of the Respondents in this cause.

Mr. Wooden: I offered it, Your Honor, as being applicable at the time, to ten, if I did not miss my count, to ten of the present Respondents who are Respondents in that case.

Mr. Zimmerman: Now, see, you limit it now to those ten.

Mr. Wooden: No, I say the question of how binding it is upon the others is a matter of law.

Mr. Zimmerman: Oh, oh. You see, he does not limit it to those ten, if he did I would retire and say nothing more about it.

Trial Examiner Norwood: I think it is clear as to how he is offering it, just like this other evidence, there are limitations upon it by law. It is not to be implied.

Mr. Wooden: Not the legal implications of the situation.

Trial Examiner Norwood: Those are connected
20324 up with the counts of the complaint as to conspiracy, and so forth.

Will the Counsel refer me to the page of the record where this definite proffer is made?

Mr. Wooden: It was on April 15.

Trial Examiner Norwood: Specify the portions of these two volumes which he offered at that time?

Mr. MacIntyre: April 15, 1939.

Mr. Withrow: Your Honor, while Counsel for the Commission is looking for that reference in the record, I have now our objections, additional objections, to Commission's Exhibit 3102.

Trial Examiner Norwood: Yes.

Mr. Withrow: And I find since yesterday afternoon that my office has typed up those objections, and my suggestion is that they be placed in the record, and I can give Your Honor a copy of those so that you can consider them.

Trial Examiner Norwood: Prior to ruling?

Mr. Withrow: Prior to ruling.

Trial Examiner Norwood: Yes, all right.

Mr. MacIntyre: Your Honor please—

Trial Examiner Norwood: I do not want them to come in here at this point, in the center of this discussion.

Mr. Withrow: Yes, I understand.

20325 Mr. MacIntyre: Your Honor please, Mr. Wooden has located the portion of the transcript that—

Mr. Paulson: I think we ought to have the objections read orally. There perhaps may be some points that should be cleared up, and I suggest that the objections be read and not break the continuity here, but as soon as there is a break.

Trial Examiner Norwood: Yes—well, probably, they should be unless Counsel for the Commission receive a copy the same as I do.

Mr. Zimmerman: Well, can you not give him a copy, too?

Mr. Withrow: I would be very glad to give Mr. Paulson a copy.

Mr. Leisure: We are willing to do it either way. We read them the other day, and the Commission suggested we should hand them in, and now suggest we read them when we suggest that we hand them in.

Mr. Wooden: Your Honor, the pages of the record

where the portions of the printed record in the old case were offered for the record in this case will be found beginning on page 19826—

Trial Examiner Norwood: Yes.

Mr. Wooden: And I believe running over to page 19836.

20326 Trial Examiner Norwood: Were there any withdrawals from that proffer?

Mr. Wooden: No, I think not.

20327 Trial Examiner Norwood: Is there an agreement on the part of Respondents in the case this is received they may be put in the record in the form of copies of the parts offered?

Mr. Leisure: Up to the present time over a great many thousand exhibits Counsel has always used photostats. I see no reason for changing the method that has been ordinarily used.

Mr. Zimmerman: I don't, either.

Mr. Wooden: That can be done.

Trial Examiner Norwood: The portions of this record in the old case against Cement Manufacturers Association and others which are specified beginning on page 19826 of the record and ending on page 19831 of the record and offered as Commission's Exhibits, for identification, 3188 to 3200, inclusive, as described in the record cited, are received in evidence and objections are overruled thereto.

(COM. EXS. 3188-A, 3188-B, 2189-A, 3189-B, 3189-C, 3189-D, 3190-A, 3190-B, 3190-C, 3191-A, 3191-B, 3192, 3193, 3194, 3195, 3196, 3197, 3198-A, 3198-B, 3199, and 3200, were offered and received in evidence.)

20328 Trial Examiner Norwood: It is understood that photostats of these particular pages may be made and substituted for these two volumes.

It should be noted that the certificate of the Clerk of the Supreme Court is attached showing that this is part of the record in the old case.

20353 Mr. Wooden: Your Honor, I would like to ask whether Mr. Leisure will undertake to produce Mr. Mallory here tomorrow morning for questioning about the preparation and the contents and his relation to Commission's Exhibits 3202, 3203-A to H, for identification—all of these are for identification—3204, 3205-A to E, 3212, and 3213. All of these are for identification—on the understanding that the expenses of Mr. Mallory's return

here for this purpose will be paid by the Commission and the subpoena will be available for him when he appears.

Mr. Leisure: Now, it has been quite a number of years since I have been in Government service, but since I was in Government service I have not attempted to furnish Government witnesses for anybody, including Mr.
20354 Wooden. I do not propose to start doing that now.

I do want to point out to Your Honor that bringing this matter up at the eleventh hour, 12 o'clock on Friday, in this way—I will not characterize it—I think it characterizes itself.

Mr. Wooden: I think it does, too.

Mr. Leisure: Mr. Wooden was supposed to have finished his case, we were talking, two weeks ago, and now at 5 minutes to 12 on Friday he is asking for more witnesses.

If he wants Mr. Mallory I suggest that he get him in the ordinary way. I have no control over Mr. Mallory in any way. I do not represent him; I am not his attorney; I have no possible way of producing Mr. Mallory here.

Trial Examiner Norwood: I think with regard to the comments, I think that Counsel on both sides are within their rights, and not to be criticized.

Mr. Wooden: Your Honor, I will then say that I am resting the case in chief for the Commission subject to this further notice: That I propose to recall Mr. Mallory for the purposes I requested, and suggest that he be recalled on the first day set for the opening of Respondents' case.

Mr. Zimmerman: I do not know of any method of resting a case with conditions. Either they close their
20355 case, and are through with the evidence in this case, or they do not.

Trial Examiner Norwood: That is the practice with the Commission, and with some other organizations.

Mr. Zimmerman: Well, it is new to me. I confess I have never seen it done before. I have always supposed that when they closed the case, they closed it.

Trial Examiner Norwood: It is a very reasonable thing to do to save time; it would save us coming back next week.

20356 Mr. Wooden: Respondents are on notice by my statement that they should prepare to meet this if they want to and that meets every reasonable requirement of the situation.

Mr. Leisure: I object to it, Your Honor. I think Mr. Wooden has had ample opportunity in the two years or so that we have been trying this case to take care of any such matter as this and I think he should have done so and I feel confident if the matter were reversed and we asked to recall a witness after we closed, the door would be closed. I feel confident that would be the case and I object to it and I see no necessity for it.

Mr. Wooden: I don't see any necessity for it, either. I will agree, there; you have made the necessity.

Trial Examiner Norwood: If Counsel withdraws objections to this identification—

Mr. Zimmerman: There is no reason why we should withdraw our objections to anything.

Trial Examiner Norwood: There is no reason why we should not have the witness back. I think you are both very meticulous—

20357 Trial Examiner Norwood: Off the record.

Do you have anything further? Do you wish a hearing called for next week to hear that witness?

Mr. Wooden: The last statement I made was to the effect I would give notice of my intention to recall him the first day of the date set for Respondents' presentation of their case.

20381 Washington, D. C.,
May 23, 1939.

20384 Mr. Wooden: Your Honor, at the last session I gave notice of my intention to pursue the matter of the introduction in evidence of certain material furnished by Mr. Mallory, the statistician of the Institute, and with that in mind some ten days or two weeks ago subpoena was sent to Mr. Mallory for his appearance here this morning. I understand a letter has been received by Your Honor from his physician to the effect that his physical condition would not permit his appearance. In view
20385 of the efforts made to get Mr. Mallory for that one purpose of identifying more completely the exhibits which he supplied at my request after leaving the witness stand, and which were furnished by Mr. Leisure for him, and which were numbered Exhibits 3202, 3203-A to H, inclusive, 3204, and 3205-A to E, inclusive, I am going to suggest, Your Honor, that you might be willing to review

the record and reconsider your ruling with reference to the admission of those exhibits in evidence.

It seems to me that they stand on the same ground that Exhibits 3045-A and 3045-B to H, inclusive, and also 3046-A and B, which were received by Your Honor in evidence on pages 19753 of the record.

Trial Examiner Norwood: Now, how were they identified?

Mr. Wooden: They were submitted through Mr. Leisure. Mr. Leisure asked that they be marked for identification when he submitted them. 3204 and 3202 are letters from Mr. Mallory addressed to me.

Trial Examiner Norwood: The ones which are already in, how were they received?

Mr. Wooden: They were submitted through Counsel, Mr. Leisure, after he left the stand, in the form of a letter and tabulations accompanying the letter in the same way that Exhibits 3204 and 3202 were submitted with 20386 their accompanying exhibits.

Trial Examiner Norwood: Well, this is also Mallory's study, isn't it?

Mr. Wooden: Yes; Mallory's statistics. Mr. Mallory is the regular statistician for the Institute subsequent to September, 1933, and prior to that time he had contracts of service with a large number of the Respondent Corporations.

In the same connection I would like to refer to Exhibits 3112 and 3113, for identification, both of which Mr. MacIntyre identified as having been furnished by Mr. Mallory, together with certain information as to what they represented, and Mr. Mallory's connection with them and the use made by him of them.

Trial Examiner Norwood: Well, I shall state, gentlemen, that I have studied the record with regard to those. We were taking in a great many exhibits and winding up matters on the last day there, it was not just clear. I thought those maps were on the same basis as the others, and I have studied the objection of Counsel with regard to them, and I think we might as well receive them in evidence, so I shall overrule the objections and receive the papers heretofore marked as Commission's Exhibits, for identification, 3202, 3203-A to H, 3204, 3205-A to E, and 3112 and 3113.

20387 (COM. EXS. 3202, 3203-A, B, C, D, E, F, G, I, 3204, 3205-A, B, C, D, E, 3112, and 3113 were offered and received in evidence.)

20402 Miss ELSIE EAVES was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark.

20403 Q. And it was some time in May, last year. Since you left the witness stand have you re-examined the files of the Engineering News or refreshed your recollection concerning the testimony that you gave while you were on the witness stand?

A. Yes, I have.

Q. Have you any corrections to make in the testimony that you gave?

A. Yes. In naming the cement companies to whom we wrote for prices I inadvertently omitted the name of the Riverside Company, California.

Q. Did you take any steps to correct that?

A. I wrote a letter to the Commission and made that correction and asked that it be recorded.

20404 Q. When was that?

A. May I consult my record?

Q. Why, surely.

A. June or July, I think. My letter was dated June 22.

Q. That was the month following your appearance on the witness stand?

A. That is right.

Q. In your testimony, as I recall it from reading it, you stated in substance that that information which you subsequently published in the Engineering Record was obtained from five companies. Will you give us the names of them, the Alpha, the Penn-Dixie, the Lehigh, the Lone Star, Universal-Atlas, weren't they?

A. That is correct, as I testified.

Q. I am using the photostatic copy, if the Court please, as a matter of convenience, of Commission's Exhibit 1136. In that exhibit the name Crestmore appears as one of the points for which you quote prices.

A. That is right.
Q. And that is Riverside Cement Company?
A. That is right.
Q. And that is the company you mentioned in your letter of about June of 1938?
A. That is right.
Q. Correcting your testimony.
20405 Is it a fact that you wrote directly to the Riverside Cement Company asking them for their prices?
A. Yes, that is correct.
Q. Did you write to other companies than the Alpha, the Penn-Dixie, the Lehigh, the Lone Star, the Universal-Atlas, and the Riverside Portland Cement for information?
A. We wrote also to the Huron Company, and at the time the Lower Peninsular prices were published, the previous mill point prices were discontinued.
Q. Did you ask for all the points at which the Alpha, the Penn-Dixie, the Lehigh, the Lone Star, and the Universal-Atlas had mills?
A. I couldn't answer that without checking because I am not familiar enough with where all their mills are. We asked for only those prices which we published.
Q. In the case of the Penn-Dixie Cement Corporation, do you recall that you asked only for their price at Richard City, Tenn., plant?
A. May I consult my record on that?
Q. Surely.
20407 Q. Then the fact is that the only quotation you asked for from the Penn-Dixie was at Richard City, Tenn.?
A. That is correct.
Q. How about the Lehigh Portland Cement Company?
A. I do not have that record with me. There were three plants for Lehigh.
Q. Would you remember them if I should mention them to you?
A. Yes.
Q. Iola, Kansas, LaSalle, Ill., and Mason City, Iowa?
20408 A. That is correct.
Q. Those were the only ones you inquired about concerning prices from the Lehigh; is that right?
A. That is right.
Q. How many did you inquire about from the Alpha Portland Cement Company?

A. One plant.

Q. That was the Ironton, Ohio; is that correct?

A. That is correct.

Q. You made no inquiries about any others?

A. That is correct.

Q. And the Lone Star, how many did you inquire about?

A. Five.

Q. Let me shorten it this way: Were they Dallas, Texas; Hudson, Limedale, Norfolk, and North Birmingham?

A. That is correct.

Q. And that is all?

A. That is correct.

Q. Concerning what plant did you inquire in regard to the Universal-Atlas?

A. Steelton, Minn.; Universal, Pa.; Waco, Texas; Buffington, Ind.; Hannibal, Mo.; Independence, Kansas, and Northampton, Pa.

Q. It was your custom, was it not, and the custom of your predecessor to write the companies for prices

20409 at the plants you have mentioned here?

Q. Do you know what the practice of your predecessor was?

A. The same practice continued; no change has been made.

Q. Do you have the correspondence or copies of it that you had with the Riverside Cement Company?

A. I am sorry; no correspondence exists prior to about a month ago; no correspondence exists in our office.

Q. You say none exists in your office?

20410 A. That is right.

Q. As I understand it, this inquiry is merely routine, a routine matter for your publication, and after you publish a month's issue you destroy the correspondence relating to those prices?

A. That is correct.

20411 The witness identified Resp. Ex. 195-A to F, inclusive, as photostatic copies sent by the witnesses publication to the Riverside Portland Cement Company and the answers received from them about their prices at Crestmore. The witness can identify a photostatic copy of her signature on Resp. Ex. 195-A. That is her assistant's signature for the witness, and it is an authorized signature.

This correspondence is with Mr. Richardson, our

20412 assistant editor, and it was carried out during a temporary transition period. When the management of the department came into her hands he temporarily handled some of the price work. They are the photostatic copies of the letters he wrote or that were written to him by the Riverside.

20416 (RESP. EXS. 195-A, B, C, D, E, and F were offered and received in evidence.)

Redirect Examination by Mr. Wooden.

20423 Q. Miss Eaves, referring to Respondents' Exhibits 195-A to F, inclusive, would you say that that 195-F, being a letter from your Mr. Richardson to Mr. Treanor, October 19, 1933, that that marked the beginning of the correspondence with the Riverside Company to get its prices which you then published?

A. I believe—yes, it does.

Q. And prior to that time you don't recall there had been any such published?

A. That is right.

Q. Referring to Respondents' Exhibit 195-B, Mr. Richardson writes Mr. Leonard of the Riverside Company on December 15, 1933, saying: "We are certainly glad to be able to establish a cement price center for the West Coast and indeed appreciate your cooperation."

Do you know what that refers to, "a cement price center for the West Coast"?

A. You mean in our publishing terminology? The significance of the publishing terminology?

Q. What it means to you in your experience in handling this work.

A. Well, it means simply that we publish a corresponding price for the West Coast to those that we had

20424 published in other parts of the country.

Q. Can you say why you didn't publish anything for the San Francisco area or for the Western Washington area?

A. No. The Boulder Dam was active at that time, and the Southern California area was active, an active cement selling area at that time.

Q. When did you begin your work on this publication, or handling of the publication?

A. I began as manager of the business news department

in July of 1932. Mr. Richardson did some of the price work for a short time thereafter.

Q. Do I understand that you cannot explain or give any reasons why you didn't have or obtain some information from the mills in Northern California and in Washington and Oregon?

A. Well, again, it is the matter of being able to publish everything. We have got to make selections. We have got to limit the amount.

Q. Did you consider the Riverside mill quotation representative of the West Coast up in the northern part of the territory?

20425 Mr. Clark: Objection. It is immaterial what she considered the Riverside prices.

Mr. Clark: I object on the ground of immateriality, what this witness considered.

Trial Examiner Norwood: I think this goes to the nature of the action on the part of this newspaper.

A. That decision was made by Mr. Richardson and not by me.

By Mr. Wooden:

Q. Can you say, Miss Eaves, why the heading for your cement prices was changed to its present point?

A. It followed a telephone conversation with one of the cement companies, and I don't remember which one, who suggested that that would be more accurate terminology for what the prices represented from their companies and we checked with another cement company to find out if that were true and when we found out it was, we made the change.

20426 Q. You took it up with only two out of your five companies?

A. As I remember it was handled by telephone.

Q. Who were they?

A. I don't remember.

Q. Not either of them?

A. No. I handled that, I handled that telephone conversation, but I don't remember who the companies were.

Q. Do you remember the individuals you talked to?

A. No, they were companies with New York telephones.

Q. Can you fix the time when that occurred?

A. No not without reference to our files. I could with reference to our files.

Q. I believe you said—

A. The correction is made in the issue following the telephone, the telephone calls.

Q. Do you think it was 1934? I believe you said that before, didn't you?

A. It may have been 1934 or '35; I cannot say, I couldn't define the date precisely.

Q. Did you learn in your telephone conversations any of the reasons for the suggested change?

A. No.

Q. May I see the cards which you have, Miss Eaves, that you referred to in your testimony a little while ago?

(The witness handed the cards to Counsel.)

20427 Q. You have handed me, Miss Eaves, four cards which you referred to a while ago containing names of the companies and the location of the mills. When were those cards made up?

20428 Q. The question is when were these cards made up?

A. I don't know. They have been a file record for a long time.

Q. They are part of the previous files?

A. They are our index about calling up on our prices.

20429 Q. You gave us four cards containing names of Universal-Atlas, Alpha, Lone Star, Penn-Dixie. Isn't the Lehigh one of your correspondents, also?

A. They were at the time that the testimony referred to in the previous hearing.

Q. But not since?

A. They are not now part of our record.

Q. There was a card, then, for Lehigh?

A. That is right.

Q. Has that been destroyed?

A. Yes, that has been destroyed when we stopped quoting Lehigh prices.

Q. Did you give the names of the mills appearing on each of these cards in your testimony under questions by Mr. Clark?

A. Yes.

Mr. Clark: May I have that read? I didn't hear it.

(Question read.)

By Mr. Wooden:

Q. Do these cards contain the names of the individuals at the various companies with whom you corresponded?

A. That is right.

Q. Will you state who they were?

20430 A. G. H. Reiter, vice-president, Universal Atlas. No individual at Alpha. J. J. Meara, sales department, Lone Star Cement. On the Penn-Dixie there is a new name that has come in in the last two months. Do you want the previous name or the current name?

By Mr. Wooden:

Q. Both.

A. We formerly wrote Walter Wing, general sales manager. We are now writing to E. W. Druckermiller.

Q. Did you give the names of all the Lone Star mills to whom you write for prices?

A. In previous testimony, yes.

20431 Q. This morning, I mean.

A. Yes.

Recross-Examination by Mr. Clark.

Q. As I understand it, Miss Eaves, referring to Commission's Exhibit 1136, the present heading of the exhibit, "Current Maximum Prices Received at Cement Mill," is new in that it contains the word "Maximum"; is that right, as compared with the former heading?

A. Yes.

Q. Formerly it read: "Current Prices Received at Cement Mill."

A. That is right.

Q. That is the only change in the heading?

A. As I remember it, yes.

Q. As you remember it.

Trial Examiner Norwood: Is it your testimony that prices were only reported to you when you asked for them?

The Witness: That is right.

20444 DR. BENJAMIN H. HIBBARD was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified as follows:

Cross-Examination by Mr. Clark.

Q. I have read your testimony over, Doctor, and you discussed wheat, cement, and a good many other commodities and the marketing of them, and some questions oc-

curred that I should like to discuss with you. I shall be as brief as I can.

When a wheat farmer decides that he will not sell locally but will ship his product to a central market, is it your opinion that he is able to influence the price as it exists at that central market when his wheat is sold?

A. I should say not. I suppose any amount would influence it a little, but it would be an infinitesimal influence.

Q. In other words, he has to sell at the price that he finds at that market if he sells at all, doesn't he?

20445 A. At the time of the shipment, yes.

Q. You wouldn't expect, I think, that any producer of a given grade of wheat, say, the first grade, could obtain more for his wheat than other producers of

20446 the same grade obtained at the same time in the same market, would you?

A. No.

Q. And it is true, also, isn't it, that most wheat is sold in this way through a central market?

A. Well, not in the first instance; sold locally, probably, much more, and then the first buyer of the wheat is the one who sends, or they collectively send the bulk of it on to a central market.

Q. Let me see if I understand that. You say "sold locally"; do you mean it is sold at the point of production by the producer?

A. In the village at which there is an elevator, probably, and a buyer; buying company.

Q. Do you recall on your direct examination you were asked by Mr. Wooden this question: "And I believe I asked you whether it"—meaning wheat—"was frequently sold at point of shipment, and if I did not, will you answer now?" And that your answer was: "It is not ordinarily sold at the point of shipment."

Mr. Clark: That is at page 15470 of your testimony.

The Witness: Yes.

Mr. Clark: I haven't it.

By Mr. Clark:

Q. Do you remember that question and answer, in substance?

A. Not too clearly. It doesn't fit with my under-

20447 standing of the case.

Q. Would you like to see your testimony?

A. Yes.

Mr. Clark (addressing Mr. Wooden): Do you have a copy of the transcript, page 15470?

(Counsel confer.)

Mr. Clark: I was wrong; that is page 15471.

By Mr. Clark:

Q. I will read it to you again and show it to you. The question to which I referred was this, and it is a question by Mr. Wooden: "And I believe"—beginning line 15—"And I believe I asked you whether it was frequently sold at point of shipment, and if I did not, will you answer now?" to which the transcript shows you answered: "It is not ordinarily sold at the point of shipment."

I don't know that it is of any great importance. I just want my mind running with yours.

A. I think I can see what happened there. Either then, or maybe it came up later, we were talking about wheat being sold in the central market, and I had here, or somewhere else, answered the question, "Is it ordinarily sold at the point of shipment?" Meaning the country point at which it is first sent and from which it is sent to a central market, and the question somewhere comes in there, "Is it ordinarily sold at the point of shipment?" That is
20448 by the local elevator company, and my answer was, "No, it is not," and I suppose that is what I was trying to say there.

20449 Q. Well, in the case of some agricultural commodities, isn't it frequently the case that there are no attempts to purchase them at the point of shipment? I say frequently the case that there are no attempts. Take California oranges, for example.

A. Well, I believe that to be the case. I never made a study of California oranges, notwithstanding the fact I have read many, many pages on their methods and I would say we have described the usual and regular way of sale.

Q. Well, in those cases it is the regular custom, isn't it, to have practically or virtually all the sales made at the markets to which the goods are shipped?

A. It is.

Q. Now, if the farmer takes his wheat to the local elevator that is in the community, in or near which he
20450 lives, there is a substantial expense borne by him in hauling it, isn't there?

A. I suppose it depends on what you mean by "substantial."

Q. There is an expense?

A. There is an expense.

Q. What would you say that amounted to if wheat sells at a dollar a bushel?

A. That is, the farmer's local haul?

Q. Yes.

A. Well, it is a long time since I have seen any estimate on that but he will haul—

Q. Well, maybe I can help you, Doctor. You at one time made an estimate of that, yourself, did you not, in the book that you wrote, and you estimated that it cost some six to seven per cent when we sell at a dollar per bushel, if you will take my statement as a correct quotation from your book.

A. Yes.

Q. You are willing to accept that?

A. Yes. I think now it would be less. See, I was giving the team haul on dirt roads.

Q. Now, they would have the automobiles.

A. Now, with a truck and with a load maybe even five times as heavy, they bring that cost down very much. It will vary and they will haul it longer distances, which can put it up.

Q. And the costs of shipping other agricultural
20451 products from the point of production to a central market such as butter, cheese, livestock, fruit, are heavy?

A. Yes.

Q. That is a very indefinite term, I appreciate, a deceptive term, but true, substantially, call it what you will?

A. Yes, it is a real cost, to get it to market.

20452 Q. Suppose we take grain as an example, and I am the farmer and the elevator is 15 miles away and

I truck it to the elevator and I sell it there at the going price, at $1.05, and I don't know what the price is when I go there. Would you say that the price at which I sell it at point "X" is the delivered price?

A. I think it is, literally, the delivered price, but I think it is quite an unlikely price before it is quoted and sent out within zones and a territory with cost charges for shipment added. The buyer knows nothing about how far it has come. He pays the market price when it
20453 gets there. That is not what I understand to be regularly a delivered price as quoted; quoted as such.

20455 Q. Would you say that the marketing of agricultural products is a type of marketing that is different from or the same as the type of marketing of manufactured products?

A. Very largely it is different.

Q. Economists generally recognize that it is different, don't they?

A. In certain respects, yes.

Q. Well, different—

A. Yes.

Q. —whatever the respects, for the moment.

A. Well, all right; it is different.

Q. The economists, I find, use the term "pure competition" and you being an economist have doubtless
20456 heard that term many times.

A. Yes.

Q. Would you mind telling us how your would define it?

A. Pure competition, in its simplest meaning, is unhampered, unrestrained competition in which you have a free and open market with no limitations and probably have a considerable number of sellers and a considerable number of buyers.

Q. Well, to shorten that, let me see if I understand it

If you have a number of buyers and a number of sellers so that no one buyer and no one seller can make the market, you have, roughly, described the market in which pure competition exists, is that right?

A. Correct.

Q. So that we are using that term in the same sense?

A. I think so.

Q. Economists point quite generally to the marketing of agricultural products as the type of marketing that most closely approximate the necessary conditions of pure competition, don't they?

A. I think so. Of course, it doesn't do it in an ideal fashion but—

Q. Does anything, or is that a concept of the economists you use for convenience—

A. It is a concept, largely, of the economists and I think it is approached on a good many occasions
20457 but that was predicated on the circumstances of simple surroundings.

20458 Q. And the economists generally agree that the conditions essential to pure competition are not found in the manufacture of manufactured goods, are they?

A. Not in a simple setting. They are not found in that form in which you have a roomful or yardful of both buyers and sellers, and such as that.

Q. Then I am to understand your answer to my question to be substantially "yes." I am not trying to criticize you; I just want to be sure that I understand you.

A. I understand.

Q. One of the reasons for the difference is that pure competition requires the presence of a large number of sellers, doesn't it, or a number of sellers?

A. That is better; a number of sellers.

Q. I know that economists, and, sometimes, the lawyers don't like these indefinite adjectives; they tend to becloud the thought.

You would expect, would you not, and I am speaking to you as an economist, now, that quite different types of marketing—we will drop the "quite" and say different types of marketing would be found in the sale of manufactured products than in the sale of agricultural commodities?

A. It is a different market. You may get severe competition, in either case.

Q. And different types of marketing?

20459 A. Yes. It may be much less severe, in other cases.

Q. You don't contend, though, of course, that the method of marketing agricultural products is the only proper method of marketing, do you?

A. Oh, no.

Q. I didn't get that from your testimony, but I wanted to be sure.

Well, is it even the only method of marketing on a competitive basis?

A. It is not the only method from the standpoint of the mechanics of it. The number of buyers and sellers present and various other important features, I would say.

20460 Q. Would you say that merely because a different method of manufacturing is used for manufactured products than is used for agricultural products indicates per se that there is anything wrong or improper by having these manufactured goods marketed by some

other method than a method used in marketing agricultural products?

A. By some other method?

Q. Yes.

A. Oh, no.

Q. I am not describing any specific method in that question.

A. No.

Q. Wheat is a commodity that moves both to central markets and also to deficient areas in the world markets?

A. Yes, sir.

20461 Q. How about cement? Is that a commodity that moves in the world market to deficient areas?

A. Not very much, in the world market.

Q. Does it at all?

A. It is shipped from one country to another, to some extent, but it is not a—

Q. Not a world market in the same way as wheat, is it?

A. No, it is not.

Q. Or corn or cotton?

A. No.

Q. Wouldn't you expect that a commodity which, because of the heavy freight charge, seldom moves over 200 miles from the point of production, would be marketed by methods essentially different from the methods in the marketing of an agricultural product such as wheat, which flows into a world market?

A. There would be many conditions of marketing which will be very different, yes.

20462 I have noticed in some writings the use of the term "calculated price."

A. Yes.

Q. How would you define that term?

A. Well, calculated price, you mean on the part of the seller, naturally.

Q. Yes.

A. Is price which he undertakes to get and which is based upon certain facts and conditions; probable costs and hoped for profits, and so on, that he arrives at a price which, to him, is, in a sense, an ideal which he hopes to realize.

Q. Is it fair to say that among economists it is the same thing as managed price or an administered price?

A. It is at least very similar to it.

Trial Examiner Norwood: Read that question.

(Last question read.)

By Mr. Clark:

Q. Well, is it your opinion that a calculated price or managed price is never a competitive price?

20463 A. Oh, I would not say that it is never a competitive price in a full and complete sense. I would say that the managing price is ordinarily a price set by men, on crops of sellers, whoever they may be, with the hope of avoiding and obviating some portion of the competition which they might meet with.

Q. Well, in the case of the calculated price, then, that answer you gave, you used only one side in your description. The buyer is not in a position to influence the price.

A. Oh, he will influence the price probably but it is the price that is set up by the seller with the hope that he will be able to get it instead of going into the market and asking for bidders.

Q. Well, then, to some extent, to what extent we need not inquire at the moment, as far as I am concerned, the seller who is formulating a calculated price takes the buyer into consideration.

A. Well, I suppose any seller takes the buyer into consideration.

Q. Well, that is the reason that you say that the buyer is in a position, or the reason you intimated in your answer that the buyer is in a position to influence the price?

A. Well, he influences it indirectly by his action, he either takes the goods over at this calculated price, or he does not take them.

Q. What happens if he does not take them?

20464 A. If he does not take them the seller may stage a sit-down demonstration and wait a year.

Q. Or he may recalculate his price?

A. Oh, yes.

Q. And he frequently does, doesn't he, or he sometimes does?

A. That is much better. He sometimes does.

Q. Getting away from that: Is the sale of automobiles a good example of sales at calculated prices?

A. It is a good example.

20465 Q. Well, are there many other examples of the price being calculated and put upon an article, and

the purchaser or intending purchaser either pays that price or does not get the article; do you think of any?

A. I can think of a very long list of them.

Q. Well, it is true of retail merchandise in the department stores, isn't it?

A. Not all of it.

Q. No, but some.

A. Especially in drug stores.

Q. In drug stores, particularly, you say, especially in drug stores?

A. I think so.

Q. Any other examples of calculated price that you happen to think of?

A. Oh, I think agricultural machinery is a good instance of what I called an administered price and I expect that and calculated price are synonymous.

Q. Well, would you say that there can be no market in the sense in which you use the term unless the buyer is in a position to influence the price?

A. No, I would not say there was no market.

Q. Would you say that it is not a free open competitive market?

20469 A. If you want a good instance of it, take the case of the machinery that the farmers are buying. Now, it is not just sold at one exact price. On the other hand, the big companies put this machinery out at a calculated price and they wait through a whole year, and the second year selling 20 percent, 30 percent of their normal output rather than meet the bidding of the country farmers.

Q. Rather than reduce their calculated price?

A. Yes. In other words, they are very powerful sellers although not very efficient sellers.

Q. Now, in the case of all goods sold for a calculated price, is it your opinion that no market exists?

A. Why, I wouldn't say that no market exists where any sales exists.

Q. Well, wheat, for example, is any particular buyer or seller able to influence the price in the market at any particular time?

A. Yes.

20470 Q. Is it not a fact that when economists use the term "pure competition," they are referring to a market where there are so many buyers and so many

sellers that no one of them is able to influence the price by his action?

A. That is a fact. It means that no one has

20471 Q. Well, is the California Fruit Growers' Exchange cooperative, in any sense, in your opinion?

A. Yes.

Q. Well, it is sold on a calculated price?

A. Not at all definitely and exactly. They have some influence over the amount of the goods that they will ship, and, of course, that, in turn, has something to do

20472 with the selling price. They don't set prices for the product which they send into the eastern market, and if they find their prices going too low they will send fewer carloads.

20473. Q. I want to take the time to read eight or ten lines to you, Doctor: "The projected or calculated or bargaining method. These terms have been applied to the work of marketing companies, usually growers' cooperative organizations, which have substantially complete knowledge concerning the supply and, as a rule, control over the major portion of it. In addition, they have a good comprehension of demand and therefore are in possession of about all the information and power necessary to arrive at a price in accordance with what the market will probably stand. The purpose of the makers of a price of this kind is to get what the goods will bring throughout the season, selling them at such prices from time to time as to induce the buyers to take entire stock during the season. If the price of cranberries, for instance, is set a little high by the Cranberry Association, and, as a result, the November trade takes less than its usual proportion of the supply on hand, it will be necessary to lower the price in order to put out a correspondingly larger quantity at a subsequent period,"—pages 161 and 162.

A. Yes.

Q. Would you say that when cranberries, for example, are sold in this way by cranberry cooperative associations on the basis of a calculated price, that there is no market to be found at the point or points of sale?

A. I would not say that.

20474 Q. You recognize the language that I read to you, do you not? It happens to be from your book "Marketing Agricultural Products," pages 161 and 162?

A. Yes.

Q. Now, in the case of standardized goods, there is not apt to be very much bargaining or dickering over prices, is there?

A. Standard goods.

Q. Yes.

A. Well, there is less than there is of unstandardized goods.

20475 Q. Would you agree with this statement, "Bargaining like advertising plays a relatively small role in transactions involving standardized goods"?

A. Give me an example, please.

Q. No, I am asking you, would you agree with the statement?

A. I agree with the statement if it applies to the case I have in mind.

Q. You recognize it as a quotation from your book?

A. I think so.

Q. Page 27 of your book on "Marketing Agricultural Products."

A. Yes.

20476 Q. Dr. Hibbard, you know of instances, do you not, of the shipping of wheat from Kansas to Minneapolis and from Minnesota to Kansas City at the same time?

A. Yes, sir.

Q. Or, approximately the same time?

A. Yes, sir.

Q. You wrote an article in the American Economic Review Supplement, Volume 9, No. 1, in March, 1913, did you not,—or do you remember the date?

A. Well, I don't know the date, but then that is probably—

Q. But you have written for that journal?

A. Yes.

Q. And you would not dispute that you wrote in 1913?

20477 A. I think that is probably correct.

Q. The article was entitled: "Effect of Government Control on Marketing Methods and Costs."

I do not know whether you remember the title or not,—and in referring to those that advocate the doctrine of laissez faire—this appears in the article—"They are convinced that there is an adequate business reason for the

apparent waste in shipping wheat from Kansas to Minneapolis and from Minnesota to Kansas City at the same moment."

You recognize that language, or substantially that language, as being yours in that article?

A. Well, I will accept it as such.

Q. And I can tell you it is, if you are willing to accept my statement for it.

A. I am.

Q. Do you know of other instances of similar cross shipment of grain or is that the only one your know of?

A. Similar ones; there is an explanation of why that cross shipment is made, is there not?

20478 Q. I think so, yes, but do you know other instances?

A. I don't know of anything else that compares in quantity, at all, with that north-south shipment, right in that section of the country, with respect to grain.

Q. Would you say at a time with such cross hauling there is no competition in the marketing of wheat due to the presence of that cross hauling?

A. No, I wouldn't say that.

Q. I didn't think you would, Doctor; I just wanted to get your answer in the record.

Would you say, then, that the presence of cross hauling in marketing does not negative the existence of competition? Now notice the question, if you please; there are no fringes to it. Would you say that the presence of cross hauling in marketing does not negative the existence of competition?

A. With respect to wheat?

Q. Yes.

A. It does not, there.

Q. We will pass that for a moment. Wouldn't you say that the presence of cross hauling in the marketing of a product; that is, any product; shows nothing one way or the other as to the existence of competition?

Again, if you will, please, notice the form of the question; there are no fringes to that.

20479 Wouldn't you say that the presence of cross hauling in the marketing of a product shows nothing one way or the other as to the existence of competition?

A. It wouldn't show anything, probably, more than a suggestion. I think I would like to look into it further before giving a very complete answer.

Q. That may be true, but would you please—would it arouse your curiosity?

A. It would.

Q. Well, you can have competition with cross hauling, can't you?

A. Oh, yes.

Q. And you can have competition without cross hauling; that is correct, isn't it?

A. Yes.

Q. In the case of two isolated producers, each with a market area separated by, we will say, 200 miles, wouldn't you say that if they each sell in the market area adjacent to the other producer so that you have cross-hauling—or would you say, in that event, there is no competition?

A. I would want to know the circumstances of what the commodity is.

Q. Take any standardized commodity. Let me read the question again to you, Doctor, and we will assume it is a standardized commodity, if you will, that is re-
20480 ferred to. In the case of two isolated producers, each with a market area separated, the producers are separated by, say, 200 miles, by way of illustration, would you say that if each sells in the market area adjacent to the other producer so that there is cross hauling to get there, there is no competition?

A. I wouldn't say that.

Q. If there was only one seller in that area there wouldn't be any competition in that area, would there? There wouldn't be any doubt in your mind about that?

A. I agree that is correct.

Q. Then it is a fact, isn't it, Doctor, that you increase competition by permitting cross hauling for sales in the area around a producer's mill; take standardized commodities?

A. You increase competition?

Q. Yes; by permitting cross hauling for sales in the areas around the producer's mill?

A. I think it would depend on how the prices were made.

Q. Let us see whether it would or not. You may be right but if producer A sells only in the area which he can reach freight-wise as against every other producer of the standardized commodity in which he deals, there is no competition in that area if the others don't come into the area is there?

A. No.

Q. So far as the sales of his commodity is concerned?

20481 A. That is correct.

Q. But if you permit the cross hauling so that competitors can get into producer A's area, you increase competition thereby, don't you?

A. I don't know.

Q. Well, do you have competition if there is only one producer selling a standardized article at one place?

A. You do not.

Q. If there is more than one producer selling a standardized article at the same place you may have competition?

A. You may; that is right.

Q. And you increase the probability of competition, put it that way, do you not?

A. Taking a large number of commodities, I would say yes.

Q. Standardized commodities?

A. Yes.

20482 Q. Well, let me read you something from your book "Marketing Agricultural Products."

20483 Q. "For instance, in a given town there may be two grain elevators run under separate managements; suppose they are of about equal size and are each doing about the same share of the business. One may be just existing while the other is making a handsome showing; it follows, in case they are both small units, that the one is doing well largely because the other is run on an expensive basis. Since the poorer one must have, let us say, 6 cents a bushel for handling wheat, the more efficient one has the choice of handling it at the same margin, or of bidding higher for grain and cutting the margin down. Possibly a very enterprising man would prefer the latter if he had any assurance that by running his competitor out of business he would be able to hold the trade for himself. He knows, however, that should he attempt to run the other out he would resist for a considerable time, and the fight would be costly. Should he make the fight and win, sentiment would be against him. He would be accused of operating a monopoly and new competition would probably be forthcoming soon. The result is that the business man of ordinary judgment prefers to let well

enough alone, and so goes ahead depending on the margin of profits which he can make over the no-profit competition, rather than flying to the ills of aggressive competition, the outcome of which is precarious."

20484 A. Yes.

Q. Is that quotation fairly typical of what goes on in various local markets for wheat and other grains?

A. Yes, it is fairly typical; there are other typical instances.

A. Yes.

A. In other sections, too.

Q. But that quotation is fairly typical?—

A. I think so.

Q. When that condition exists, namely, that both elevators are following the same price for wheat at a given grade, would you say there is no genuine competition in the local market?

A. Well, ordinarily, you have some competition there.

Q. Genuine competition, you would call it?

A. Yes, I would think so.

20486 Q. At page 15433, Doctor—considerable record.—if you will take my word for this, and if there is any question in your mind about it—I know you won't doubt what I will say, and if there is any question we will get the transcript—you stated in your direct testimony that, it would be very curious for a farmer to submit bids netting him varying prices at a given moment to a number of delivery points.

Now, it is not true that in the marketing of walnuts, raisins, some other agricultural crops, sales will be

20487 made at different prices, differently priced at the same moment, and therefore with different net returns on the various sales?

A. Well, I think you are clear out of my sphere of knowledge. I don't know anything about walnuts from the selling end, except that they are having difficulty in selling them, and whether that is true or not I think would not be an outstanding typical or very valuable instance.

Q. Well, do you recall writing a paper on "Stabilization of Prices," which was read at the annual meeting of the American Economics Association in December, 1920?

A. Yes.

Q. Do you recall stating, in that paper, with reference to the walnut and raisin growers—I am quoting now:

"Under all ordinary circumstances sales will be made at different prices, but this is of no importance to the individual producer since the sales are pooled"?

A. Yes.

20490 Q. Is it not the practice of the California Fruit Growers Exchange to ship in carload lots to various markets over the country and sell each lot for what they can get for it?

A. Yes.

Q. Doesn't that result in the California Fruit
20491 Growers Exchange receiving different net returns for the various sales made on the same day,—assuming more than one sale is made on the same day?

A. It does.

Q. Would you say that wherever that occurs in the case of agricultural products that they are sold at the same time, at different points, namely, that they are sold at the same time at different points for amounts which differ in their net returns, that there is no competitive price?

A. Under this case given, that of the fruit, I would say that it is a competitive sale.

Q. Well, would you say that when this happens competition has been inhibited or suspended?

A. No, I wouldn't say that.

Q. When you said in your book, "Marketing Agricultural Products," and again,—if you will be good enough to take it from me that what I am going to read to you is what is in the book, or part of it,—"For example, oranges distributed by the California Fruit Growers Exchange sell for about the same relative prices on a given day, all over the country,"—were you referring to the amount received at distant points, such as New York, or Boston, for example?

A. I should think so.

Q. There would not be any doubt in your mind about it, would there?

20492 A. No.

Q. In the case of fruit sold through the organization, you consider that the amount received at the delivery points, for example, fruit marketed in Boston, is the price, do you not?

A. Yes.

20493 Q. Now, in the case of these sales of California fruit, they are on a delivered price basis, are they not?

A. I would say not.

Q. Well, what is their price basis, Doctor, if they are not on a delivered price basis?

A. It is an auction price that is fixed in the auction room of the fruit company.

They don't know what they are going to get in advance.

Q. All right. Let us break it up, for a minute.

There is a price received as a result of the auction, is there not?

A. Certainly, and if they didn't deliver they wouldn't get any price.

Q. Then they do deliver for the price received at
20494 the auction, do they not?

A. They do.

Q. And in that sense it is fair to say they receive a delivered price whether the price is fixed by auction, or not?

A. Yes, but that is the same as the answer I gave immediately before recess; that that is not what we mean when we use this somewhat technical term "delivered price."

Q. From the amount at which those sales are made the cost of transportation has to be deducted and borne by the California Fruit Exchange, doesn't it, in behalf of the different producers constituting that Exchange?

A. I always count the freight is paid by the consumer.

Q. Does he actually pay it?

20495 A. Literally he pays it.

Q. You mean by that he goes down to the freight office and gets the freight bill and pays the bill and takes the receipt, is that right?

A. No, I mean in the price paid for the fruit in Boston, grown in Southern California, that the man who receives the oranges may pay the freight or they might pay it at the other end; it makes no difference, but—

Q. Let us put it this way, Doctor; let us say, if we can get away from terms that, even to me, are indefinite; whatever we call it, the amount it takes to get the oranges from Southern California to Boston is taken out of the price received at the auction?

A. Yes, sir.

Q. That is right, isn't it?

A. Yes, sir.

Q. And, to that extent, reduces the amount received

by the California Fruit Growers Exchange and that amount is properly called a price; the result of the auction?

A. Yes.

20499 Q. When the farmer sends his wheat to a central market, Doctor, such as Chicago, is the price at which the wheat is sold the going price on the market at the time it is sold, assuming it is sold?

A. So one would assume.

Q. You would say that is the price at which the sale was made, wouldn't you?

A. Yes.

Q. Now, when an economist writes, "If their stability of prices over short periods is desideratum it can no doubt be obtained by cooperative organizations," is the economist referring to what is bid on the central market or what is netted by the farmer after deducting transportation charges? You recognize the quotation, Doctor?

A. Not very clearly.

Q. Well, it is from your article, "Stabilization of Prices," page 23.

A. Well, the inference there I suspect is, that is, I don't recall what the context is. I expect I was discussing the efficacy, that is, the power of cooperative companies to control prices. I suspect that might be it. At least it could easily be it, and then what I would say is that they

20500 may get a stabilized price and save certain fluctuations over a short period of time, but with extremely few exceptions they have very little control ove. the price in any fundamental way. In other words, they don't change the market level of prices. Whereas, in the instance that you read me concerning cranberries a while ago they made a very substantial difference in the prices.

20505 Q. Let me repeat that question: If transportation rates advance without a corresponding increase in the market price of the product at a central market, nevertheless this is a sale, and in that case would you say that the price for that commodity has fluctuated?

A. I would say it has not fluctuated according to the quotations of the central market, but the farmer will receive less.

Q. I will agree with you; I don't think we will have any dispute about that.

Would you be referring to the prices quoted as the re-

sult of actual transactions on the exchange rather than to amounts netted by the farmer on the goods shipped to the exchange for sale in these quotations I have read?

A. I was referring to the stabilization or leveling out of prices from moment to moment, or day to day, among a group of cooperative shippers.

Q. Now, from the passage in your book on marketing agricultural products, I wish to read you an extract, and in the passage, page 63, you said: "With the price of wheat at $1.50 per bushel and the cost of hauling 30 cents per ton per mile, the whole value of the wheat would be used up in a haul of 166⅔ miles." I don't know whether you remember that statement or not.

20506 A. No, I don't remember it.

Q. Well, I can assure you that it was made and I have the book here and will be glad to show it to you.

A. Well, I don't know why I should not have made it.

Q. To what were you referring when you said the price of wheat at $1.50 a bushel, were you referring to the minimum amount the farmer got?

A. No, sir.

Q. What were you referring to?

A. I was referring to the price at which the wheat was sold.

Q. That is the price to be paid at the point of delivery?

A. Yes.

Q. On page 63 when you said, "The figures showing the distance over which a product could be hauled at a cost equalling its selling price is of interest only as illustrating the distinct limitations of the agricultural industry." Now, to what were you referring when you spoke of its selling price? Let me put the question in another way: Were you referring to the amount paid by the buyer at the point of delivery or the net amount realized by the purchaser after deducting the cost of transportation?

20507 A. I am not doubting it. I, of course, referred to the selling price on the market to which the wheat went, assuming that the purchaser probably, or anybody else who owned the wheat was sending it there to be sold and was speaking about high charges. If you want an illustration of what has happened in that, I will give you one.

20509 Q. Well, again, at pages 66 and 67 of the same book, where you say, "Mention has already been

made of the influence of a sudden increase in freight rates whereby the cost of moving freight reached a higher figure than the amount left for the farmer after it was paid—" Then there is a lapse which was done purposely in order to save time,—"one of three things has to happen: The freight rates must be lowered; the price of produce must rise high enough to stand the charge; or agriculture and the industries must be readjusted geographically so as to avoid the long hauls of bulky produce," that is the end of the quotation.

20510 What were you referring to when you used the words, "The price of produce must rise high enough to stand the charge"? Were you referring to the price paid at the distant market, or were you referring to that amount netted by the producer after taking the cost of transportation?

A. No, sir; I was referring to the price paid by the distant purchaser. I would say that the price paid by the buyer, of course, must be high enough to cover the freight cost and bring the produce in and sell it. Maybe that is what I had in mind right there.

20511 Q. Quoting further from page 61 of that same book, Doctor, where you say: "If one farmer is able to get his goods to market for less than it costs his competitor he will be the gainer to the extent of the difference, since his goods will sell for the same price." To what were you referring when you used the phrase "his goods will sell for the same price"?

A. The same price as the man whose goods are shipped in at a higher freight cost.

Q. Let us see if I understand that.

Trial Examiner Norwood: What do you mean by "price" there?

By Mr. Clark:

Q. Yes.

20512 A. I mean he gets at the central market—that sounds as though I were speaking of a man who ships his goods into the central market probably over a railroad and if someone can get a lower freight charge on his produce he will be the gainer but it will not change at the time the price for which the grain will sell.

20514 Washington, D. C.,
May 24, 1939.

20522 (COM. EXS. 3177-A to 3177-4C were offered and received in evidence.)

20529 DR. BENJAMIN H. HIBBARD thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Clark.

Q. Dr. Hibbard, I notice at page 15590 of your direct testimony in this case you were asked this question by Mr. Wooden:

"Q. 'As an economist, do you consider the one method of getting the most that can be gotten for a product is to avoid competition?'"

And your answer was:

"A. Ordinarily, yes, competition in sales means that some one is likely to underbid, and if one can avoid the competition, chances are that he is going to get a higher price."

You recall the question and answer, do you?

A. Yes, sir.

20530 Q. I want to call your attention, specifically, now to the form and content of the question, again, so to do so I shall, with the leave of the Court, read the question again. Mr. Wooden's question was precisely this—and I am not attempting to give his emphasis, I am giving my own emphasis when I read it:

"As an economist do you consider the one method of getting the most that can be gotten for a product is to avoid competition?"

Now, did you understand the question in the sense of my emphasis when you answered it "Ordinarily, yes"?

A. I assume that your question refers to the emphasis on "one". As to whether there could be any other?

Q. Yes, sir.

A. Well, I don't quite see any occasion to change the answer.

20538 Q. Well, if two farmers bring a load of wheat to the one local elevator that is in a community, and each farmer sells his load for a dollar a bushel,—would

you say there is no competition, taking that situation alone now?

A. Oh, I would say that they are, in general, competitors; they probably have no occasion, one of them, to offer to sell for less than the other, because they can both sell.

Q. Well, assuming the same facts, would you say there is no price cut, no price competition, in that transaction?

A. There is no evident price competition, and I think I may say there is no competition. The competition among farmers is very broad, widespread, and impersonal.

20540 Q. Suppose the demand of that single elevator that we have been talking about,—the demand of the single local elevator that we have been talking about,—is for the moment limited by its available capacity so that it can only purchase the supply of one of those two farmers. Now, do you consider that if both the farmers are to act competitively, one or both of them ought to offer to sell at a lesser price?

Notice,—if they are to act competitively,—ought one or both of them to offer to sell at a lesser price than a dollar?

2054[illegible] A. I will say yes, if you will permit me to qualify it by saying assuming that each of the two is very anxious to unload his wheat at that particular moment.

Q. Well, if they fail to bid against each other, then, under the circumstances assumed in my question, my prior question, would you say that they are not acting competitively?

A. Yes, because—I will take your example as you gave it. The elevator is full; about. They know it isn't likely to stay full even over night, and one of them will prefer, rather than taking 50 cents or a dollar or two dollars less for his load of wheat, he will first ask himself whether or not he is not likely to get the same price by the mere inconvenience of holding it over a little bit.

Q. If farmer A then drops to 98 cents is it incumbent upon farmer B to drop to, we will say, 96 cents, if he is to act competitively?

A. He either accepts this lower price offered, or he doesn't. He is a potential competitor and if he wants to say "I am out of the market" when this 98-cent offer is made that is exactly his privilege.

Q. I understand your answer to be, if I may express it

in my own language, if he is to act competitively he must drop below 98 cents, is that right, if the other farmer has already dropped to 98? Is that your answer?

A. I would say he is not acting competitively at
20542 the moment against his farmer-neighbor; that he is accepting that as a price low enough so that he doesn't care to go below it.

Q. I don't quite understand. Was your answer that if farmer A has already dropped to 98 cents then farmer B must drop below 98 cents or he is not acting competitively?

A. I merely say he accepts the competition as stopping at that point; 98 cents.

Q. If he does not?

A. If he does not go below the 98 cents he is saying that the competition has gone far enough.

Q. Is there competition, then, when both of them are willing to sell at 98 cents and only one of them can sell at 98 cents because of the capacity of the elevator?

A. I would say there was competition, a little bit earlier, and if farmer A accepts the 98 cents, the other man says, "I will drop out," competition doesn't go down to zero; neither does it require two offers—

Q. I was just going into that. If farmer A, in turn, drops to 94 cents and farmer B should go to some point below that, 92 cents, and so on, is that right, if they are in competition?

A. If they are going to compete to the bitter end, I suppose they will go on down until they have nothing left.

Q. Is that what you consider cement companies ought to do to secure a sale?

20543 A. Taking my last illustration I will say no.

20550 Q. "The new organization can at least approximate the ideal of feeding the market. That this will have a salutary influence on prices, is not open to question."

That was written by you, was it not, in the book;
20551 do you recall?

A. Undoubtedly.

Q. And do you recall saying, too, at page 166, of the same book, "Marketing Agricultural Products":

"Feeding the market may involve one or both of two important practices. It may be done by sending the goods to the best available market,"—and there is an ellipsis

which I think does not mitigate the sense,—"or it may involve the withholding of a portion of the supply for a time in order to prevent glutting the market. Either or both of these practices are entirely desirable from the standpoint of the growers and likewise of the public."

Do you remember that?

A. Yes.

Q. Well, in general, then, Doctor, is it not fair to say that you regard stability of price as desirable?

A. A real degree of stability; yes; that does not mean a rigid price.

Q. I understand.

Do you recall discussing in "Marketing Agricultural Products," your book, the advantages to be gained by marketing grain, through a single national sales association acting in behalf of all of the farmers?

A. Well, I don't think—

Q. Do you recall discussing it?

20552 A. Recall having discussed it? Yes.

Q. In this connection, do you recall saying—at page 326 of the book, and I am quoting now—that:

"One important factor making for stability of prices is information, and in this the new organization should be able to exert a great influence"—then an ellipsis—"the new organization would unconsciously act as a steadying influence on the price."

That was your analysis at that time, was it not?

A. Undoubtedly.

Q. Well, at page 166 of the same book, you said the following:

"by the orderly procedure of feeding the market a
20553 relative degree of stability is maintained in the place of violent ups and downs which give opportunity for undesirable speculation."

That is correct, is it not? What you said there, the substance?

A. Correct.

Q. Well, would you say that a stable price indicates of itself, per se, the absence of competition?

A. Not a reasonably stable price, no.

Q. Isn't it a fact that many prices are stable under severe competition largely because the price is about where it belongs?

A. Where it belongs, or where it is put.

Q. My question was, isn't it a fact that many prices are stable under severe competition largely because—I don't say that, universally, but many prices are stable under severe competition largely because the price is about where it belongs?

A. For a time, that would be true. I can't make
20554 out that that statement refers to any specific length of time; a long time, a year, or any length of time.

Q. You have made statements to the same effect, haven't you?

A. No doubt.

Q. And you made such statements to Counsel in the oil case at Madison, did you not?

A. The statements I made to Counsel in the oil case are not officially reported.

Q. That, of course, was not the question, Doctor. The last question I asked you was whether or not it was a fact that many prices are stable under severe competition largely because the price is about where it belongs.

A. I think that is correct.

Q. Yes, sir. And then you said you had made statements to that effect elsewhere than from this witness stand, now.

A. Yes.

Q. And I asked you if you hadn't made statements substantially to that effect to the Counsel for some of the defendants in the oil cases at Madison.

Let me see if I can refresh your recollection.

A. I think that is correct, and if the circumstances are put up as I understood them then, I will certainly corroborate the judgment.

Q. Yes, sir.

Do you recall—I suppose you do—you had several
20555 conferences with various counsel of the oil companies from time to time?

A. Yes.

Q. One, for example, in the Blackstone Hotel in Chicago when, I take it, you were seeking information about the questions that were involved there and the nature of the oil industry. It is not with that one I am concerned. There were five or six counsel present there.

You recall, of course, at least one conference that you had in Madison some time in the fall of 1937. There were present at that conference, or conversation, Mr. Truman

Young, a name quite well known in the Government service, now, of St. Louis, and Mr. George Ray, of New York, the general counsel for the Texas Company.

Do you remember those gentlemen?

A. Yes, sir.

Q. Do you remember having a conference with them about the marketing practices in the old industry and various matters?

A. Yes, sir.

Q. You stated to them at that time and place, in substance, as follows, did you not: "This"—referring to gasoline prices—"isn't the only instance of a steady or level price to be found in the country. There are very many of them under more or less similar circumstances.

For instance, in city after city the wholsale and the
20556 retail prices of milk have hardly moved either up or down over periods ranging from five or six months to, substantially, as many years. In some cases these prices were greatly influenced by public authority; in others, they were not.

"This steadiness of price would appear to indicate that, first, such prices were about where they belonged. They were high enough so that the producers of milk were not making trouble, and, at the same time, the dealers were not having difficulty with the consumers. The question is often asked, Are such prices as these competitive? On the face of the question it would appear that the answer would have to be: These were not competitive prices. As a matter of fact, there was severe competition in connection with any and all of them. The competition did not take the form of frequent changes of the price of the milk in the bottle. It was competition for the trade of the city on the part of milk producers. It was competition on the part of certain distributors for the business within the city. It was not the kind of competition that results in a rapid jumping up and down of offers or bids. The supply of milk was in various ways held down to about the quantity needed. Experience had shown about what it would bring, and both producers and distributors recognizing these facts were content to let the price run along during the time, long or short, while these conditions obtained, with the result that

we have had, in city after city, quite thoroughly
20557 stabilized milk prices. It must not be supposed that these prices are in any sense set at a high from

which they cannot deviate. When conditions change in any fundamental way, prices are changed accordingly."

You remember making that statement in substance or effect?

A. I do.

Q. Do you consider that the fact that a price is specified indicates any collusion on the part of the members of the industry?

A. No. I think I stated there probably this was price set about where it belonged.

Q. Well, do you recall the substance of a question like this being asked you at the time and place that I have mentioned, and under the circumstances, asked by either Mr. Young or Mr. Ray:

"Would you say that the level line of prices shown on the graph"—the graph was exhibited to you—"justifies any inference that there was a concerted action on the part of members of the industry to fix the price at that level?"

The answer was:

"I should say not. The fact that the price remains at a given level for some period of time, long or short, does not indicate concerted action with reference to an agreement. It means that having arrived at a figure for
20558 a time which is relatively satisfactory to both buyers and sellers, the price will not only be a single and not a multiple price—it must be that. That is due to the very patent fact that gasoline is a commodity which has reached a high degree of uniformity, and it would be unthinkable that one brand within any given market should sell for a price appreciably different from other brands. In markets such as this with a well stabilized supply of raw material, the occasions for changes in retail prices are not likely to be met with frequently so long as these prices remain at substantially the same figure, and in view of the stable supplies, the wholesale price in all reason should not show either frequent or violent fluctuations. Hence it is not surprising that the wholesale price may remain at a given level for a considerable number of months."

You made that statement?

A. Correct.

Q. Then it is a fact that standardization of a product tends to level the price and cause it to be stable? I said, "Tends to level the price and cause it to be stable."

A. Yes.

Q. You recall, I suppose, writing in the book we have referred to so frequently, "Marketing Agricultural Products," page 26:

"The more exactly produce can be brought to a standard of quality the more nearly can prices be leveled 20559 over both territory and time."

You recall that?

A. Yes.

Q. Would you agree that in the case of manufactured products unstability of price is apt to lead to a price war?

A. Most conspicuously so in respect to a good many articles, less so in others, but in general in the case of simple products brought to a single standard, it will.

Q. If two producers each begin to shade the price against the other, isn't that the form which a price war takes if it goes far enough?

A. Yes.

Q. And if that mutual reduction of prices each being lower than the other proceeds far enough it will bring prices below cost,—that is correct, isn't it?

A. I suppose whenever prices go down they are likely to get down to cost, or below.

Q. Well, the question was: If it proceeds far enough it will bring the prices below cost.

A. Most assuredly.

Q. Do you consider that such a price war is in public interest?

A. I doubt that it is a "yes" or "no" question. I think sometimes price war might be a very desirable episode, but if the prices are within reason I should say price 20560 war is a bad thing, a price war is usually a bad thing.

Q. Well, you recall, of course, discussing your views of this very question with the gentlemen whose names as I mentioned as oil counsel at Madison, don't you?

A. Yes, in connection with price wars in that field I would say that the public gets little or no benefit for it.

Q. Do you recall stating to counsel in response to this question as follows—this was the first question, I mean at the time and place we have mentioned, at Madison, and with the circumstances and persons present whose names I have mentioned:

"What is the effect upon the refining industry if prices for the finished product?"

That was gasoline he was referring to—"are not sufficient to cover the cost of raw material plus the cost of manufacture?"

You replied this way, or in substance this way:

"Well, like any other manufacturing industry you are running at a loss and in a serious situation financially, and they will naturally want to do something to correct the difficulty."

20570 Q. The answer that you gave was:

"Well, like any other manufacturing industry you are running at a loss and in a serious situation financially, and they will naturally want to do something to correct the difficulty."

Do you remember giving an answer in substance that,—do you not?

A. I do.

Q. And the cement industry is a manufacturing industry, is it not?

A. It is.

Q. Likewise the gasoline—the oil industry is a manufacturing industry?

A. It is.

20576 Q. Doctor, in the case of cement, assuming that it rarely moves over 200 miles from the point of production on account of the relatively heavy freight costs, and assuming further that the freight represents on the average, from 20 to 25 percent of the delivered price, as it is now sold, do you consider that it would be feasible to sell such a product on a central exchange?

A. I would not think so.

20577 Q. Well, the principal reasons that we have central markets in grains, metals, and so on, is that the product or the commodity is a commodity that moves to deficit points; isn't that correct?

A. I think so.

Q. Well, do you know of any commodity traded in in a central market such as the wheat market in Chicago where there is not a group of speculators taking part in trading?

A. In what sort of market did you specify?

Q. Such as the wheat market in Chicago.

A. Well, the wheat market is a speculative market and there are many others.

Q. And the speculators play a very large part, without attempting to define what extent, in marketing wheat,

20578 do they not?

A. Yes, they play a considerable part.

Q. Well, less than one percent of the wheat or corn or oats sold on the Chicago Board of Trade is settled by actual delivery; is that right?

A. I haven't a doubt of it.

Q. Well, would you consider it advantageous to have a like amount of speculation going on in the marketing of cement?

Trial Examiner Norwood: Do you want it read?

The Witness: Well, I could say that I see no particular reason for a speculative market in cement.

By Mr. Clark:

Q. That was not the question, Doctor. You have 26579 forgotten the question.

Trial Examiner Norwood: Read the question.

(Question read.)

A. Wasn't that about what I answered?

By Mr. Clark:

Q. I didn't so understand your answer. Would you mind answering it again?

A. Well, I would say that the occasion for it is not obvious and I, therefore, would say there is no obvious reason for wanting to establish a speculative market in cement.

Q. Well, for the purpose of shortening this, am I to understand, then, that your answer is that you do not consider that it would be advantageous to have as much speculation in the cement market as there is in the grain market?

A. So far as I know, that is so.

Q. It is true, too, isn't it, that the only commodities that are sold on a central exchange are those that fluctuate constantly, or quickly or rapidly in price due to frequent changes in supply and demand and the estimates of traders in regard to the future supply and demand?

A. That is the usual situation.

Q. Would you expect the price of cement to fluctuate from hour to hour if it were traded in on a central market or, having answered as you previously answered, could you answer this question at all?

26580 A. Well, I would be using my judgment plus some imagination, to know what a cement future trading market would be like, because I think there is good

reason to believe that it can better be handled some other way.

Q. That what can be better handled some other way?

A. That the cement market does not require a central exchange for future trading.

Q. Well, does it require a central exchange for present trading?

A. I think not.

Q. Well, would you regard in cement the constant fluctuation in price that takes place and occurs in the grain market, for example?

A. I don't think I would advise it, or hope for it.

Q. Well, then, am I to understand that you would not regard it as desirable? You say you don't think you would advise it.

A. They are so unlike it is pretty hard to get a comparison that would help one to give an answer to a question just like that.

20591 Q. Do low prices always benefit the consumer?

A. I can't answer the question without knowing something about how low or under what conditions? Do we mean that low prices are worse than high prices to consumers?

Q. No; do they always benefit the consumer?

20592 You can answer that, Doctor, without qualification—

A. I can't answer that "yes" or "no."

Trial Examiner Norwood: Answer it any way you want to.

The Witness: I can discuss it briefly, very briefly.

By Mr. Clark:

Q. All right; do so.

A. I would say that the prices lower than can be maintained reasonably within a branch of industry or trade that appear at the moment to benefit the consumer may react against him.

20598 Q. What tests of fairness in price would you place on an industry other than that of open competition?

A. Well, as to fair competition, it is generally recognized that competition can be justified.

By Mr. Wooden:

Q. I didn't say unfair competition.

A. Didn't you ask me about unfair?

Q. No, I asked you what tests of fairness of price do you have other than open competition?

A. Oh, other than open competition?

Q. Yes.

A. There I suppose we have the public test of
20599 investigation and judgment.

Q. If you don't have that, what do you have other than open competition?

A. Well, if you don't have open competition you presumably have some degree of monopoly.

Q. What would you say as to whether in any condition of competition, any degree of competition, are there always some marginal producers?

A. In substantially all lines of undertaking of business there are marginal producers.

Q. Would it follow that any reduction in price is always endangering the future of the existence of some marginal producers?

A. It at least strongly tends in that direction, yes.

Q. Can you have any reduction in price as the result of competition or otherwise without making the position of the marginal producer more precarious?

A. It would have a strong tendency to make it precarious, yes.

Q. Well, as an economist, would you suggest that marginal producers ought to be protected against reduction in price?

A. I should say that that is impossible and unquestionably undesirable. It is not a matter of sympathy. If we must always protect the marginal producers then prices must go indefinitely higher in order that they and
20600 their followers would be able to live and succeed.

Q. You were asked something about a centralized market in the case of grain and the possibility of using a centralized market in the case of cement. Is a centralized market synonymous with open competitive market, necessarily?

A. Perhaps not necessarily. Perhaps the leading ones in the—there are produce exchanges which are open and competitives primarily.

Q. Were there times when there have been organized interferences with the openness of centralized markets?

A. Yes, there have been.

20602 Q. You were asked something about grain moving to deficit areas. Do you find that grain moves to surplus areas, as well?

A. Grain may move to an area which in general 20603 is a surplus area, yes.

Q. As a normal and regular course of trade, or exceptionally instances?

A. Not the same kind of grain, not the same grade of grain.

Q. Well, if you found the same grade of grain moving into surplus rather than into deficit areas, what would be your opinion, as an economist, about that situation?

A. Well, I should think my first thought would be that it was a very proper subject for investigation. I should say that it would be quite contrary to usual marketing circumstances, and that it would be much in need of explanation.

Q. Well, what would it indicate to you as an economist?

A. Well, if it were the same kind of grain moving into a surplus area I would assume that there was not an open regular market in operation.

Q. Did you ever know of a farmer who at the same time sold his wheat to different buyers at different realized prices to the farmer?

20604 A. Well, I never knew of such case. I am sure if it happens it will happen very rarely and not under any important or usual circumstance.

By Mr. Wooden:

Q. As an economist, what would you think if a group of farmers regularly sold their wheat at different realized prices as of the same time? That is, I mean so that each farmer got a different realization from one buyer than he did from another?

Mr. Clark: I don't see the materiality of it and I object to it on that ground, if the Court please.

Trial Examiner Norwood: Objection overruled.

A. Well, I would think that if that could happen 20605 at all they would have to have a very firm hold on the entire market making different prices, and that it would not at all correspond to an open competitive market.

By Mr. Wooden:

Q. Do you see any analogy between the marketing methods used in farm products and the methods described in

the cement industry as outlined in my long hypothetical question on page 15421?.

20606 A. Well, I should say that on major farm products that they are marketed in an essentially different measure. In the first place, the prices are not discriminatory. They are not delivered prices—the farm prices I am talking about, of course. They are prices at the point of sale, either at the farm or village nearby, which geographically amounts to about the same thing, and their delivery is made there. Occasionally the farmer ships further than that, but he ships into a market or hauls into a market and takes the offerings of the moment which, as I understand it, is quite unlike the marketing of cement.

By Mr. Wooden:

20607 Q. You were asked some questions about the effect of transportation costs and prices of farm products. If the transportation costs were doubled over night would that be to the interest of the seller who ships the commodity?

A. Of the seller?

Q. Yes.

A. No; it would not.

Q. Well, as an economist why wouldn't it be to the seller's interest if the price the seller receives is the delivered price?

A. Well, if it would be the delivered price, of course, then he would add the freight, the augmented freight price to the selling price, presumably, and it is a thing which the farmer virtually never does and is not in position to do, so that if freight charges go up suddenly, no matter what the ultimate outcome is, immediately, that is on subsequent shipments, he is going to get as much less or something approaching as much less as the amount of the increase in the rate.

Q. Take it in the case of other commodities than farm products, as an economist, if the delivered price is the price that the seller actually receives, why shouldn't he favor the highest possible transportation cost?

A. I don't think I quite got the question. If he merely charges that and gets it back it would not help me. If you make the question a little plainer, I will try to say something else a little further.

20608 Q. Well, as I understood your replies on cross-examination, you believe that the price to the farmer

was what the farmer got after the deduction of the transportation cost; is that right?

A. That is correct.

Q. Now, with regard to a quotation that was read you, Doctor, about competition resulting in high prices as well as in low prices, what did you mean by a statement that competition might produce opposite effects of that sort?

20609

A. Well, I think I must have been—I haven't looked that over and don't know what comes next, or preceding this statement, and, of course, competition may raise wages and it may raise the costs, and such like. I cannot quite think I was saying that competing sellers would, through competition, raise the price. Of course, competition will raise prices as well as lower them, and it means competition as it operates may tend toward higher prices.

Q. What would be the effect of competition among buyers as distinguished against competition among sellers?

A. Well, competition among buyers ordinarily results in an immediate increase in price. You may have any number of buyers at a given price if they don't compete, but if they compete, by the very definition, some will overbid others.

Q. Would you say whether or not competition among buyers would produce higher prices, and whether or not competition among sellers would tend in the opposite direction?

A. I would say "yes" to that double question, that that is about what will happen.

Q. Some questions were asked you relative to cross-shipments of wheat as described in an article of yours that you published in that book in 1913. Do you recall that?

A. Well, I would not be sure which one it was in. 20610 I know I have written on that subject. Undoubtedly that is correct.

Q. Do you recall any circumstances in the wheat markets as of the time you were writing?

A. Yes.

Q. What were they?

A. This cross-shipment of wheat has been over one route probably more than almost all others put together; that is, substantially one route, not one railroad, and the cross-shipment of wheat has taken place between the Southwest center and in Kansas City more than anywhere else.

It might originate at another point, from there to the Twin Cities, Minneapolis and St. Paul, occasionally it has gone as far to the Northwest as Grand Forks, N. D., and this means the shipment of soft wheat, as they sometimes call it, it may be hard wheat, but it is not as hard, and that means it contains less protein than millers need for a certain mixture in the Southwest, and they ship it up there, and probably—not necessarily—they probably buy hard wheat, which is spring wheat, gro- in North Dakota, Montana, and so on, and ship that back to Kansas City, in order that they may get what they consider an ideal blend in each place,—each set of places—and there is a cross shipment of wheat, but there will be a real difference in the wheat, and a real difference in the wheat is the occasion for this extra freight.

20611 By Mr. Wooden:

Q. Because of a real difference in the wheat price, as well as in the wheat quality?

A. Oh, there is a greater demand for the wheat that tends to be scarce, which virtually always—not quite always—which virtually always is the hard wheat of the northwest,—will go up as it is wanted in somewhat unusual channels, as to supplement the deficiency of protein, or gluten, in the southwestern wheat, and if there is a greater demand for that the premium may be quite high on it, it will not raise the price of the southwestern wheat appreciably to take some of it up there because there is almost always more of that than we want, anyhow.

Q. State whether or not your testimony regarding cross-shipment of cement, and your conclusions drawn from it, what relation that had to the greater standardization of the product than in the case of grain.

Mr. Clark: That is objected to as beyond the scope of the cross-examination, if the Court please.

Trial Examiner Norwood: I do not think so; the objection is overruled.

A. Well, as the case has been presented to me, the ment is standardized so that the differences in grades, if there ever were any, have virtually disappeared, and most cement is sold as a given standard product;

20612 therefore, it is not an exchange of products from one territory to another, in order to balance up the graded grades for each territory. Therefore, the cross-

shipment which appears to have taken place is occasioned by some other principle altogether.

Q. You were asked something about calculated or managed prices.

Has the farmer been able to use or obtain so-called calculated or managed prices?

A. Well, as was brought out in the cross-examination yesterday, the farmers have in some very minor instances been able to use this principle, one of the best, although it is a very small one, and that is in connection with the cranberry crop,—where they project the prices into the future—that means for a season—and frequently they have been very successful. That is just a tiny bit, even, of the fruit supply of the country, and they have been able to gauge the demand for it well enough so that instead of selling too much at one time, and running out of products later in the season, they have spread it over the season instead of having a glut, as they have previously had. That was what drove them to this organization,—they have been able to market that fast enough so they are virtually all used up in the spring.

Q. But as to major agricultural products, what would you say?

20613 A. They have attempted it, and have succeeded to an extremely small degree so little that it can hardly be discerned. They have not been able to calculate by this, as farmers, over a season, for great crops. They have tried it,—and I do not want to be understood as saying they never got nothing—they have accomplished a very little on certain occasions that way in that direction.

Q. You were asked something about stable prices.

A. Yes.

Q. I will ask you whether or not stable prices sometimes become rigid prices, in your experience?

A. Well, they certainly do. The degree of stability that has been put into farm prices, prices of farm products, by farmers' organizations is very slight, although there are a very few instances, and this one probably will suffice, although I could give one or two more, in connection, for example, with certain kinds of tobacco.

20615 Q. Dr. Hibbard, speaking of price wars; in your judgment as an economist may a price war or the threat of a price war be used to maintain the status quo of the existing price level?

A. The threat of a price war?

Q. Yes.

A. I suppose the threat of a price war might,
20616 I think a price war wouldn't have a stabilizing influence.

I suppose fear, that there might be a price war, might result in holding, for example, a price at a given level rather than running the risk.

Q. What about the long run effect of a price war as distinguished from its immediate effect?

A. Well, the long run effect of a price war, I suppose, would vary greatly from time to time. Some industries are threatened with price wars and others almost never encounter them, never experience them; that business firms are, in general, afraid of them since they lose money at the time. The public appears to make a little, at the time.

20617 Trial Examiner Norwood: Well, do you expect a price war usually to result from normal decreases in price?

The Witness: Normal decreases?

Trial Examiner Norwood: Yes.

The Witness: No, I wouldn't think so.

Trial Examiner Norwood: Is that the usual thing?

The Witness: It would—

Trial Examiner Norwood: —or what?

The Witness: No, it is generally an abnormal decrease in a price, or in the price of some portion of the product that creates the price war.

We do not have very many price wars, that is as to number of products I assume right now—there are a few, and if there is some wholesale product that is obtainable quite below par, below the regulation price, then it will manifest itself in a very low retail price, and this we call price war.

Does that answer your question?

Mr. Wooden: I think so.

Trial Examiner Norwood: Well, tell us something about the conditions, then, the economic conditions, that would be calculated to produce price war?

Would it be more likely to occur in a time of overproduction, or just what does make them more frequent?

20618 The Witness: I think that they occur more often in times of overproduction.

I should think about the best instance, historically, that we have of price wars was in connection with the price of railway service that I mentioned before recess. There were freight price wars—that is, freight wars—about forty—let us see—around fifty years ago,—and, earlier, of course,—and some of those were very fierce. Those were due to the overpowering bargaining ability of single men or companies. The story always suggests at once the prime actor in it from the outside, and that was John D. Rockefeller, where he compelled the railroads to haul his products at a very low price, and they frequently still lowered price until it seemed there was no limit. Nevertheless, that was not a lone instance.

Railroads that were looking for more business bid one under the other on hauling, especially hauling live stock, from the Middle West, or the further Middle West to Chicago, and going down—or giving—I am giving this from long memory—they got down to two-thirds, and probably one-third of what they called the normal rates—that was before we had published tariffs, and those were real price wars, and they were due to the fact that we had more railroads than we probably needed, or appeared to have needed, to carry the freight of the country.

By Mr. Wooden:

20619 Q. Would you characterize the conditions in the marketing of farm products as a price war?

A. No, no.

Q. Yet it has been very severe competition?

A. It is severe, but it is impersonal competition. It is not conscious competition of A against B, and one man does not say to himself, "I will undersell these other people." They probably are very widely scattered, and it becomes thoroughly impersonal, and they compete without knowing it, they compete merely by contributing a mite more to the supply until it becomes an oversupply.

Mr. Clark: Mr. Wooden—

By Mr. Wooden:

Q. It is not a question, then, I take it, of the degree of competition, but the purport or intent of it?

A. Well, it becomes—

Q. Or what do you mean by that?

Mr. Clark: I am not going to object; I am sorry I arose. If Your Honor please, might I interrupt at this stage

to take up another matter with Your Honor and Mr. Wooden at the minute?

Mr. Wooden: Well, I am about through.

Mr. Clark: Well, if you would be good enough—

Mr. Wooden: Just one more question.

20620 Mr. Clark: Just one more question?

Trial Examiner Norwood: Go ahead.

Mr. Wooden: Yes.

Mr. Clark: I do not want to curtail your examination.

A. Well, in that—if I get the purport of your question—the competition is so impersonal that one man, or one group, will have no consciousness of competing against any other one man or one group; but they all compete, nevertheless, very definitely, one against the other, and they may bring the price down until it is almost impossible to proceed in the production of the goods.

That may happen.

By Mr. Wooden:

Q. Did you ever know of farmers following a practice of refusing to sell other than on a delivered price basis?

A. Refusing to sell other than on a delivered price basis?

A. Refusing to sell other than on a delivered price basis?

Mr. Clark: We object to that, if the Court please.

Trial Examiner Norwood: It goes to the similarity and difference—

Mr. Clark: All covering direct examination, as I understand it.

Trial Examiner Norwood: I hardly think so. The objection is overruled.

A. Farmers don't ordinarily sell on the delivered
20621 basis, as we understand that term, so they don't refuse it because it probably doesn't even occur to them, or opportunity for doing so is not even offered.

20631 By Mr. Clark:

Q. In your answer you made to Mr. Wooden on his redirect examination, did you mean to imply that farm products are never sold at delivered prices?

A. I hope I didn't say "never." I should have said it is a very unusual thing that farmers sell at what we understand to be delivered prices.

20639 Washington, D. C.,
May, 25, 1939.

20650 CARL W. J. GRIMMELMAN was thereupon re-
20651 called as a witness for the Commission, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark:

Q. Mr. Grimmelman, in reading the testimony that you have hitherto given in this case, I encountered statements from you concerning the differential that existed, as I understand it, in various Atlantic ports, one or more of them between foreign cement and domestic cement.

For example, my recollection is that the differential that was mentioned in the testimony was 30 cents in the metropolitan area of New York. Was that your testimony?

A. The metropolitan area in New York, the differential is 21 cents; that is, as far as the figure goes, but the import price is f.o.b. trucks, and the domestic price is f.o.b. cars, which would make it an effective differential of about 25 cents per barrel.

Q. I see.

A. However, that is not the differential that meets the competitive impact. To meet the competitive impact the importer has to figure with an imaginary trucking differential, so the actual differential is less than what it appears, and that is the New York situation. The other ports, similar situations exist.

The importer, also there, has to figure with an
20652 imaginary trucking cost to meet the competitive impact on railroad siding, f.o.b. cars at dealers' yards.

Q. Does the differential with which the importer meets the competitive impact; is that the same at each of the ports?

A. It is not the same because geographical situations are different at the various ports.

Q. Did the so-called American Committee, of which you testified that you were chairman, I believe, meet with the domestic manufacturers at any time?

A. I testified that they never did meet.

Q. Now, you are down in the testimony as having said—let me read this question to you; maybe you can recall it; page 19029 of the official record.

The question was put to you, I believe, by Mr. MacIntyre; yes, by Mr. MacIntyre?

"Can you give me the dates on which you or any of your members of your committee, or the entire committee itself, met with any of the representatives of domestic cement manufacturers?"

Then there was an objection by Mr. Zimmerman, and the Trial Examiner said: "Ask him if he ever did."

20653 Your reply here is: "This committee never met a hundred percent of the domestic manufacturers."

Did your committee ever meet any of the domestic manufacturers or representatives?

A. I believe I testified in answer to that question that this committee never did meet with any of the domestic manufacturers.

Q. And that is a fact, isn't it, that it never did meet with any of the domestic manufacturers?

A. It never did meet with any of those domestic manufacturers.

Q. At another place in your testimony, in response to questions by Mr. MacIntyre, you discussed the practice of meeting changes in price; what you did when you met changes in price. You remember I called your attention to that testimony this morning when we were talking about this matter.

The question put to you was:

"Is it your practice to make inquiries among the dealers as to what prices they are paying for cement, Mr. Grimmelman?"

Your answer was: "We get information if there is a price change a few minutes after we have the information."

That seems a little ambiguous to me. I don't understand the meaning of it. Will you explain your answer, there?

A. When a price change takes place, up or down,

20654 we have the information immediately.

Q. From what source?

A. From the dealers, or from other sources as we find it out in the market, and if the price is down, the same morning we meet the competition, and we are down.

If the price is up, we are watching the market very carefully, and as we are interested in getting as much as possible for our cement, we go up in price; in other words, we meet the competition up or down.

Q. Well, then, as I understand your answer, when the price change becomes public, you follow it, or not, according to the dictates of your judgment at that time?

A. That's correct.

Q. Oh. Do you have advance notice of a contemplated change in that price before you get the public notice?

A. No.

20680 PERCY I. TAYLOR was thereupon recalled as a witness for the Commission and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark.

20715 Mr. Clark: Will Your Honor allow me to ask there then one question of Counsel?

Trial Examiner Norwood: Certainly.

Mr. Clark: If Counsel will say here that he will never contend at any stage in this case, either before 20716 the Commission or before the courts, that he will never contend that an inference arises from this witness' testimony throughout the country that the practice was the same.

Mr. Wooden: What practice throughout the country?

Mr. Clark: That the instances that this witness and you introduced here are not applicable to all the Respondents in this case in a conspiracy case.

Mr. Wooden: That is wholly a matter of law.

Mr. Clark: Well, I am just wondering what you are going to contend.

Mr. Wooden: Of course I am going to contend that the acts of one Respondent are the acts of all, of course I am.

20741 Washington, D. C.,
May 26, 1939.

20749 PERCY I. TAYLOR thereupon resumed the stand and testified further as follows:

20764 *Cross-Examination (Continued) by Mr. Clark.*

Q. Mr. Taylor, with respect to destination prices or destination bids during the Code period, it is a fact, is it not, that the Department of the Interior, and particularly the Bureau of Reclamation, required the compliance with the Cement Code or any applicable Code of the bidders?

A. Yes, that was compulsory.

Q. Is there a copy of that in the record? Do
20765 you have with you a copy of the certificate which bidders were required to sign in that respect?

A. No, I haven't.

Q. Would you recognize the language of it if I should read it to you?

A. Yes, I believe I would.

20766 Q. I am reading from Standard Form No. 36. I will be glad to show you this so that you can follow it as I read it. There is no use introducing it in evidence, I think, Your Honor.

"Standard Government form of continuation schedule for standard form 31 or 33 (Supplies).

"N.R.A. compliance. The contractor shall comply with each approved Code of Fair Competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved Code of Fair Competition, then as to such trade or industry with an agreement with the President under section 4 (a) of the National Recovery Act (President's Reemployment Agreement), and the United States shall have the right to cancel this contract for failure to comply with this provision and make open market purchases or have the work called by this contractor otherwise performed at the expense of the contractor, and the contractor shall not accept or purchase for the performance of this contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who

shall not have certified that he is complying with and will continue to comply with each Code of Fair Competition which relates to such articles, materials, or supplies, and/or in case there is an approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

20767 "The following certificate form shall be signed and submitted by all bidders with all bids involving expenditure of Government funds (whether federal or non-federal), and in accordance with Executive Order No. 6646, dated March 14, 1934. Only bids accompanied by such certificate shall be considered or accepted. Bidders shall also require subcontractors (including suppliers) to sign similar certificates before making awards to or purchases from such subcontractors. Such certificate may be accepted as evidence that the contractor is complying with the applicable approved Code or Codes of Fair Competition adopted under Title I of the National Recovery Act for the trade or industry or subdivision thereof involved, or, if there be no such approved Code of Fair Competition, with the President's Reemployment Agreement."

Those were the instructions to bidders, were they not, during the Code period from your department?

A. Yes; for all Government departments.

Q. You know for all Government departments?

A. Standard Government form.

Q. And the Bureau of Reclamation gave those instructions to all bidders?

A. Yes.

Q. Did you require that the bidders sign a certificate of compliance as follows:

"It is certified that the undersigned is complying 20768 with and will continue to comply with each approved Code of Fair Competition to which he is subject, and/or if engaged in any trade or industry for which there is no approved Code of Fair Competion, then as to such trade or industry that he has become a party to and is complying with and will continue to comply with an agreement with the President under section 4 (a), of the National Industrial Recovery Act (President's Reemployment Agreement), and that all other conditions and requirements of Executive Order No. 6646, dated March 14, 1934, are being and will be complied with.

"Provided that where supplies are purchased that are

not mined, produced, or manufactured in the United States (Sec. 2, Title III, of the Act approved March 3, 1933, Public No. 428, Seventy-Second Cong.), the special or general Code of Fair Practice shall apply to that portion of the contract executed within the United States."

Is that the certificate that the Bureau of Reclamation required bidders for cement to sign?

By Mr. Clark:

20769 Q. Or in substance the certificate.

A. During that period.

Q. During the Code period only; that is true.

A. Except possibly for some modifications.

Q. That you don't know?

A. That I don't know about.

Q. Do you know whether or not in every instance of a bid by the California Portland Cement Company during the Code period a certificate of compliance with the applicable Code was required to be signed?

A. No, I don't know that, but I presume that it was, because that certificate of compliance was used entirely, or, rather, at all times, during the Code period.

Q. Do you recall any circumstances of the rejection of bids by the Bureau of Reclamation because certificate of compliance was not signed by the bidder?

A. No, I don't recall that, no.

Q. That is specifically?

A. I wouldn't recall.

Q. Do you know whether or not any were rejected for failure to sign?

A. No, I don't.

Q. Do you know whether or not your Bureau issued invitations for bids for cement in Southern California and Western Arizona and Southwestern Nevada, in

20770 that area, Southern California, that is, south of the Tehachapi Mountains, during the Code period, except for the Boulder Canyon project?

A. They probably invited bids for work in connection with work on the All-American Canal, which is a part of the Boulder Canyon project.

Q. All right. That I would include as part of the Boulder Canyon project.

A. I don't recall any other projects in that area except possibly the Yuma project in Southwestern Arizona may have required some cement during that period.

Q. Is it not a fact in that area which I have just described roughly geographically, that aside from the Boulder Canyon project, and its ancilliary projects, that the Bureau of Reclamation issued only a very few invitations to bid for cement and then only for lots of one to three carloads?

A. That is probably true, because the Yuma project would not require much cement, there being no construction.

Q. Do you recall—I didn't intend to interrupt you.

A. That is all right.

Q. Do you recall what the bid on the Boulder Canyon project was, whether destination or f.o.b. mill?

A. I am very sure it was f.o.b. mill.

Q. That is your present recollection?

A. That is my present recollection without checking.

Q. Would you wish to check and refresh your
20771 recollection on that point?

A. I would not have those bids with me.

Q. No, you haven't them here, you mean. Where are they, the contracts of the bids, if you know?

A. The bids are in the returns office.

Q. In what office?

A. In the returns office of the General Accounting Office, and I am quite sure that the Southern California companies bid f.o.b. mill in their combined bid.

Q. Joint bid?

A. Yes.

Q. It is a fact, is it not, that the Boulder Canyon bid was made jointly by the Monolith Portland Cement Company, California Portland Cement Company, the Southwestern Portland Cement Company, and the Riverside Portland Cement Company f.o.b. mill?

A. I believe those were the four companies that submitted a joint bid, yes. My recollection is that the bid was f.o.b. mill.

20772 Q. Can you state whether or not, Mr. Taylor, the Southern California mills, and by Southern California mills I mean Southwestern Portland Cement Company, Riverside Portland Cement Company, California Portland Cement Company, and the Monolith Portland Cement Company—when I use the term "Southern California mills" those are the mills I will refer to—following the

Code period bid identical bids in response to invitations from the Bureau of Reclamation?

A. I believe that three of the mills did, although I would like to refresh my memory as to that.

Q. You have no distinct recollection, then?

A. No.

Q. Could you refresh your memory?

A. Yes, I would like to check that. I have in mind one invitation that I believe three of the mills did bid alike.

Q. On one invitation. My question was all-inclusive for the period.

A. I only recall now one instance, and I would prefer to check that.

Q. You would not wish to commit yourself that that is the only instance?

A. No.

Q. Can you check that?

A. Yes.

20775. Q. If the inference arises from your testimony on direct examination, Mr. Taylor, that since the Code most bids by cement companies have been f.o.b. destination bids, did you intend to include the California companies in that inference?

A. I did not intend to include any particular cement company.

Q. Let me see if I understand that: You didn't intend to include any of the eastern companies in it?

A. We don't deal with the eastern companies as far as the Bureau of Reclamation is concerned.

Q. You didn't intend to include any of the companies in it, if I understand your answer correctly, that serve any of the eleven western States, is that right, from Spokane south?

A. My testimony would cover cement companies dealing with the Bureau of Reclamation. They are entirely in the western part of the country.

Q. The Lehigh Company deals with the Bureau of Reclamation from a Washington branch, does it not?

A. No, they bid from a western branch office.

Q. Out in Washington?

A. I don't recall their using their eastern office as headquarters.

20776. Q. If your testimony given on direct—let me put it in another way—gives rise to the inference that

since the Code most bids of cement companies on invitations of the Bureau of Reclamation have been f.o.b. destination bids, did you intend to exclude the cement companies serving the Reclamation Bureau or did you intend to include all of them in that statement?

A. It was a general statement.

Q. Intended to cover all of them?

A. Without having in mind any particular company.

Q. Is the true—I don't mean true in the sense of not false—but is it correct, so far as the California Portland Cement Company is concerned,—are they included in it?

A. If they have bid to the Bureau of Reclamation, they are included.

Q. Did they bid destination prices?

A. I can't answer that.

Q. Did the Southwestern Portland Cement Company bid destination prices during this period?

A. I can't answer that.

Q. Did the Monolith Portland Cement Company bid them?

A. I don't know.

Q. Did the California Portland Cement Company bid them?

A. I don't recall.

Q. Did any of the companies around San Francisco Bay bid them?

20777 A. I don't recall whether they did or not.

Q. But you could ascertain from the records in the Bureau of Reclamation, could you not?

A. It could be done, yes.

20817 Q. Your knowledge was no better, was it, Mr. Taylor, when you testified on direct examination than it is now with respect to the particular matters about which I am asking?

A. My knowledge on direct examination was from bids handled here in Washington, which is a very small part of the 512 that you have listed. Most of the invitations that you have listed were made in the field of which I have no knowledge.

Q. I am not talking about 512.

A. 212.

Q. I am talking about bids made by the California Portland Cement Company between December 24, 1934, and including October 11, 1938.

A. There may have been not over three or four bids made by that particular company that came into Washington.

Q. Well, assuming there were only three or four, you don't know how many of those bids were f.o.b. mill bids, and you didn't know at the time you testified on direct examination?

A. I did not know the complete story at that time. I knew in a general way that the bids that were received by the Bureau which came into Washington by award, but I did not know the complete story, of course.

Q. Well, regardless of the complete story, let us see how definite your knowledge was. You say "in a
20818 general way," what do you mean by that. Did you know at the time you testified before here of any bids, did you have in mind any bids that were made by the California Portland Cement Company during the period I have asked you?

A. No, not of any particular company. I was making a general statement for all cement companies.

Q. Then you didn't intend to include the California Portland Cement Company in that statement?

A. I intended to include all cement companies bidding to the Bureau of Reclamation.

Q. Well, tell us which ones did bid to the Bureau of Reclamation during that period? You say you had all in mind that bid to the Bureau of Reclamation.

A. The companies bidding to the Bureau of Reclamation, I probably cannot name all of them; the four Southern California companies, Monolith, Cowell, Calaveras, Beaver, Superior, Spokane Olympic, Oregon Union, Three Forks.

20819 Q. What was that last?

A. Three Forks, Colorado, United States, Monolith, Portland Mid-West, Republic, Trinity, Lehigh.

Q. That is that Western Lehigh out in Washington?

A. Yes. They sometimes bid from Kansas City, I believe.

Q. I don't know.

A. I probably have left out ten or a dozen that I cannot remember the names of offhand.

Q. Do you know how long it has been since United States has sold any cement?

A. United States Portland Cement?

Q. Yes.

A. At Betsy, Colo.?

Q. Yes.

A. I believe we have received bids from the United States and the Colorado, I think they are both at Betsy, Colo.

By Mr. Clark:

Q. But you don't know, that is merely your belief.

A. How is that?

Q. It is merely your belief, you don't know?

A. Well, I don't seem to know anything without referring to the records.

20820 Q. You know, don't you?

A. I have seen bids from the United States Portland Cement Company recently, though.

Q. Recently?

A. Yes.

Q. Well, you know, don't you, that the Spokane Company did not bid at all at destination?

A. I don't know that.

Q. Don't you know that it invariably bid f.o.b. mill?

A. My recollection is that on Grand Coulee cement they bid f.o.b. mill.

Q. That is not my question. My question was: Don't you know they invariably bid f.o.b. mill to the Bureau of Reclamation?

A. No, because my knowledge has to do only with those bids that come into Washington and the Denver office purchases large quantities of cement that don't come into Washington.

Q. Well, those that come into Washington, don't you know that they were f.o.b. mill?

Mr. Paulson: I object.

A. I know that they were f.o.b. mill.

20821 Trial Examiner Norwood: Do you know that or do you not?

The Witness: I know that they were f.o.b. mill as far as the Columbia Basin project and the Grand Coulee Dam are concerned.

By Mr. Clark:

Q. Then, what did you base your statements on 20822 so far as Spokane was concerned when you said that most of the bids were destination bids?

A. The original bids that we obtained from the Washington office were f.o.b. destination.

Q. What one have you obtained from the Spokane Company at any time that is a destination bid?

A. I can show you that.

Q. All right.

A. I think—

Q. Let us see it.

20823 The Witness: The purchase of cement that I had in mind when I made that answer was our invitation 386067-B-1, at which time the Spokane Portland Cement Company, according to this abstract, bid $3.17 f.o.b. destination.

By Mr. Clark:

Q. That is the only one you know of?

A. No.

Q. You have another one?

A. I think there was a second one where they repeated the same bid of $3.17 f.o.b. destination.

Q. On the same project?

A. Yes.

Q. It was on those, then, that you base your general statement with respect to the Spokane Company, that most of their bids were f.o.b. destination.

20824 A. As I said before, I had no particular cement company in mind. I was making a general statement covering all companies so far as bids for cement that came into Washington.

Q. My question is this, I don't want to irritate you, when you made your general statement that most of the bids of the cement companies were f.o.b. destination bids—

A. In a certain period.

Q. Yes. What period was it limited to?

A. We first asked for bids f.o.b. mill which we did not receive as a general rule, and then we asked for bids f.o.b. mill and or destination, and we received destination bids in many cases.

A. It came to my attention that does not refer to Spokane or California companies.

By Mr. Clark:

Q. At all?

A. No, I don't say that. I say I didn't have in mind any particular companies; I was making a general statement.

Q. Well, so far as the general statement is concerned, you don't know whether it applies to the Spokane companies and the California companies?

A. I think probably—

20825 Q. No, I said k-n-o-w; I am not asking about probabilities.

Trial Examiner Norwood: Just tell us what you know about it.

A. I know that Spokane bids both ways, but whether they bid sometimes f.o.b. destination or sometimes f.o.b. shipping point, I don't know that.

By Mr. Clark:

Q. You have injected a new element, which I haven't appreciated is here before us. You intend, as I get the meaning of what you said, to limit your statement about most bids being destination to a certain period. Now, what period, as precisely as you can now define it, was that statement intended to be limited to?

A. I cannot give you the exact dates.

Q. No, I say, as precisely as you can define it, what years, or from what months in what year to what months in what year, or from what year to what year?

A. Well, I hesitate to answer that because I don't want to make an incorrect statement as to the periods. It would be—the only way I could answer that correctly would be to refresh my memory from our records.

Q. Will you do that for us? You have precisely the question in mind what I have asked, have you?

A. Yes, except you understand that means my examining all of our files.

20826 Q. Well, had you examined them at the time you gave your testimony on direct examination, all your files?

A. Oh, no.

Q. Well, did you intend to limit the period of the application of that general statement of yours at the time you made your direct testimony? Is my question clear to you?

20827 A. Well, yes, except that I answered the question as it was put to me. I don't believe any periods were involved.

Q. Did you have in your mind at that time a reservation of the period to which your answer applied when you answered Mr. Woolen's question?

A. Yes, I had in mind, no doubt, the general period that we were getting destination bids.

Q. Well, what was the period that you then had in mind as being the period during which your general statement was applicable?

A. I would have to refer back to the testimony before I could be sure. If I mentioned any dates in my direct testimony—

Q. I don't recall that you did, Mr. Taylor. I don't know.

A. Probably the dates were supplied in the question.

Q. No, I think not.

A. If I remember my testimony correctly I stated that the Bureau of Reclamation first requested f.o.b. mill bids which they did not receive. Then the general procedure was f.o.b. shipping point and/or destination and we obtained, then, many destination bids.

Q. Yes. Well, now, during the time that the invitations read f.o.b. mill or destination did you receive only destination bids or, in most cases, destination bids from the Spokane Company?

20828 A. I wouldn't know that.

Q. And you didn't know, at the time you testified on direct, here, did you, whether or not most of the bids made by the Spokane Company were destination bids?

A. If I can answer that in this way—

Q. I would like to have the answer yes or not, and then the witness can explain.

Trial Examiner Norwood: You are asking him for an explanation?

Mr. Clark: I think I am—all right, go ahead.

By Mr. Clark:

Q. Answer in your own way.

Trial Examiner Norwood: Go ahead.

A. My recollection is that the Spokane Company bid almost wholly on Grand Coulee Cement, as far as any bids coming in to Washington is concerned.

The early bids were f.o.b. destination but the recent bids on Grand Coulee bids have been f.o.b. shipping point.

Trial Examiner Norwood: Now state whether you did or did not know that at the time he has designated.

A. Yes, I knew at the time that I made the direct testimony except such bids as have come in recently since—

20829 By Mr. Clark:

Q. Let me see if I understand you: That, you knew at the time you testified on direct that most of the bids made by the Spokane Company in response to invitations of the Bureau of Reclamation were destination bids, is that your testimony?

A. No.

Q. Oh; you didn't know, then?

A. The question is, possibly, confusing to me.

Q. I don't intend it to be confusing.

A. I knew at the time I gave direct testimony that the Spokane Company had made f.o.b. destination bids and also f.o.b. mill bids but the—

Q. Now—

Trial Examiner Norwood: Let him finish.

A. —but the proportion between the two, I wouldn't be sure of.

By Mr. Clark:

Q. In other words, is it fair to say that you didn't know the proportion between the two at that time?

A. Well, we can't carry everything in our minds.

Mr. Clark: May I have an answer to the question?

By Mr. Clark:

Q. You didn't know, did you?

A. The proportion?

Q. The proportion, at the time you testified?

20830 A. The exact proportion, no.

Q. Well, generally, you didn't know the proportion, did you?

A. Yes, in a general way.

Q. What was it?

A. About 50-50.

Q. I am going to ask you to produce the bids made by the Spokane Company showing that the proportion was about 50-50 between destination and f.o.b. bids, at any time; you can take your choice.

A. I have no bids.

20832 Q. Let us pass, for a moment, and see if we can clarify this with the Superior Portland Cement, Inc., of Seattle.

Did you have in mind the Superior Portland Cement Company at the time that you made your statements or

statement to the effect that most companies bid on the destination price only—that is not correct—that most of the bids received from the companies were destination price bids?

A. I didn't have in mind any particular cement companies.

Q. Then is your answer that you did not have in mind the Superior Portland Cement Company?

A. Yes.

Q. You did not have that company in mind?

A. No company in mind.

Q. Well, let us see if we can clarify that. Had you given consideration to bids made by the Superior Portland Cement Company of Seattle, if that is the correct name of the company, there are only two there, as I recall it, one called Superior and the other Northwestern. Had you given consideration to bids by the Superior Company of Seattle when you made that statement?

A. I had given consideration to all bids which
20833 came into Washington, which I handled.

Q. Yes. Of course, that is not an answer to my question, if the Court please. What bids of the Superior Cement Company of Seattle did you give consideration to before you made the statement? Be specific now, what bids of the Superior Company?

A. Well, it would be impossible for me to state exactly what bids, when they were invited, invitation number, the number of barrels, who awarded—

Q. Mr. Taylor, at the time you gave your testimony in the direct examination, did you know what bids of the Superior Company you had given consideration to?

A. I knew the Superior Company had bid f.o.b. destination as well as f.o.b. mill.

Q. Will you give us then the instances in which the Superior Company bid f.o.b. destination that you then knew?

A. I have three cases here in the book, abstracts.

Q. Except during the Code period.

A. Except during the Code period?

Q. Yes, any time outside of the Code period, now. You refer now to the bids shown on Exhibit 111-H, don't you, Superior Portland Cement Company, being a copy of an abstract of your Department?

20835 Q. Were you looking for the exhibit number to which I referred (handing document to the witness)?

A. That is one case, yes.

Q. Any others?

A. Yes—

Q. During the code period they all were, weren't they?

A. Those of which I have knowledge, or, rather, have papers with me to refresh my memory are in the code period.

Q. Now, Mr. Taylor, when you gave your testimony on direct about the proportion of destination bids, you were referring to the code period; were you not?

A. I was referring to the entire period the bids were received, and bids which I handled here in Washington.

Trial Examiner Norwood: Were some of them after the Code period?

The Witness: Yes; some before, some during, and some after.

20838 Q. Don't you know, Mr. Taylor, that the Superior Company has not bid a single time f.o.b. destination since the Code period ended?

A. Of course I couldn't be sure of that. My recollection is that the bids that would come into Washington by the Superior since the Code Period have been f.o.b. mill.

Q. That is your present recollection?

A. Yes.

Q. Was that your recollection at the time you gave your testimony on direct?

A. Since the Code period?

Q. Yes.

A. Yes.

Q. But you did not intend to include Superior in that statement that the prevailing basis was f.o.b. destination; is that right?

A. According to the direct testimony just read, my statement referred to three periods before the code; during the Code and after the Code.

Q. Well, I am asking—

A. And I did not have in mind the Superior Company.

Q. Well, now, let me ask you a similar question with respect to the Spokane Company. Is it not a fact that

20839 since the Code period, after the ending of the Code period, and by that I mean after May 27, 1935, the Spokane Company bid uniformly f.o.b. mill on its bids to the Bureau of Reclamation, or do you know?

A. Only with respect to the bids that came into Washington.

Q. Then after those, they were f.o.b. mill, weren't they?

A. My recollection is that they bid f.o.b. mill.

Q. Now, take with reference to the Spokane Company, a period before the Code, that is before December, 1933, before December—what was the date—the 3d, 1933. It is a fact, isn't it, Mr. Taylor, that the Spokane Company's bids before December 3, 1933, were uniform f.o.b. mill bids?

A. I don't know that without refreshing my memory on that.

Q. Well, did you have any knowledge of it at the time you gave your testimony on direct?

A. Yes, I would have a general knowledge of the Spokane if they bid, and if the bids came into Washington.

Q. Well, your knowledge, of course, was the same when you gave your testimony on direct as it is at the time you are testifying now, was it not?

A. Except that we have had bids.

Q. Since the time—

A. Yes.

Q. —of your testimony on direct?

A. Yes.

20840 Q. I am not referring to that. If you want, we will put that off and cover it at another time. Now, let me go back again. Your knowledge at the time you testified on direct examination, being the same as it is now with reference to the period prior to the Code, my question is, the Spokane Company invariably bid f.o.b. mill on Bureau of Reclamation prior to the Code period, didn't it?

A. I couldn't say that they did or did not.

Q. And you cannot say that at the time you testified on direct examination that they did or did not bid that way?

A. Not the Superior.

Q. No, I said Spokane.

A. Or Spokane.

Q. You cannot say as to Spokane?

A. No.

Q. Now, as to the California Portland Cement Company since the Code, your knowledge of its bidding was no greater at the time you gave your testimony on direct than it is now; is that correct? Now, again, we are leaving out this period since you last testified.

A. Yes.

Q. Very well, then. And the California Portland Ce-

ment Company since the Code period has not bid except one time on anything on an f.o.b. mill basis on Reclamation Bureau bids; isn't that correct, Mr. Taylor?

20841 A. I cannot answer that.

Q. Well, all the bids that have come to your attention from that company in Washington, isn't that correct?

A. I cannot answer that.

Q. You have no recollection?

A. I have nothing to refresh my memory. I cannot carry those things in mind.

Q. Then your knowledge, of course, was no greater about that matter at the time you gave that testimony on direct than it is now; that is correct, isn't it?

A. I would make the same general statement now that I made then regarding bids.

Q. Well, that general statement was not made, was it, with reference to the California Portland Cement Company?

A. Oh, no.

Q. It was merely a general statement.

A. Yes.

Q. And you didn't have the California Portland Cement Company in mind when you made it?

A. No.

Q. And didn't intend to include the California Portland Cement Company in the statement?

Just a minute, please. Isn't that correct?

A. No, it is not correct.

Q. Well, did you intend to include the California

20842 Portland Cement Company?

A. I didn't include any cement company.

20850 Washington, D. C.,
May 29, 1939.

20863 JOHN P. SIMPSON was thereupon recalled as a witness for the Commission and, having been previously sworn, testified further as follows:

Cross-Examination.

The Witness: Your Honor, before starting this cross-examination I have one correction I would like to make in my previous testimony.

Trial Examiner Norwood: All right.

The Witness: I think it was the date of my last appearance.

Mr. Leisure called my attention to the fact that I had testified that there was a rate of 15 cents per hun-
20864 dred pounds on cement from Rockland, Maine, to Bristol, New Hampshire, showing as having been in effect July 1, 1935, and that a correction sheet issued June 7, 1937, changed this rate effective at once to 17½ cents.

Mr. Leisure called my attention to Maine Central Tariff, I.C.C. No. C-4463, and asked me if that tariff did not name a rate of 17½ cents.

I have examined that tariff since my last appearance and find that on April 1, 1937, the rate was changed to 17½ cents and the only error in the schedule was the date of the correction sheet.

20946 (RESP. EX. 204 was offered and received in evidence.)

(RESP. EX. 205 was offered and received in evidence.)

20947 (RESP. EX. 206 was offered and received in evidence.)

(RESP. EX. 207 was offered and received in evidence.)

(RESP. EX. 208 was offered and received in evidence.)

20955 (RESP. EX. No. 104-A to 104-N, inclusive, was offered and received in evidence.)

20958 (RESP. EX. 105-A and 105-B was offered and received in evidence.)

20976 Washington, D. C.,
May 31, 1939.

21064 WENDELL HOLMES was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Cross-Examination.

By Mr. Clark:

21071 Q. Are there land grant rates applicable in the northeast?

A. There are no land grant roads in the northeast.

Q. I am not asking you about land grant roads, at the moment; I am asking you if any land grant rates are applicable in the northeastern part of the United States; take the New England States?

A. No, I should say they are not.

21072 Q. Passing now to another subject, have we those two exhibits 368 and 369, I believe those are the numbers.

Trial Examiner Norwood: 368 and 369?

Mr. Clark: No, sir, they are Commission's Exhibits, I believe.

By Mr. Clark:

Q. I am going to ask you to hold that in your lap, if you will, please. You can follow better.

Was the Federal Trade Commission Exhibit No. 368 the one that was pursuant to invitation No. 483-37-76 issued by the Quartermaster at Fort Leavenworth, bids to be opened April 17, 1937?

A. What was the question?

Q. I am trying to identify 368.

A. Yes.

Q. That bid, the abstract shown there.

A. This exhibit is abstract of bids received in response to that.

Q. In response to invitation 483-37-76?

A. That is right, sir.

Q. To be opened April 17, 1937?

A. That is right.

Q. And that is one of the exhibits which you have testified to on your direct examination?

A. That is right.

21073 Q. Well, what commercial rate was applicable there, and between what points and the amount of it?

A. I couldn't say without referring to other records.

Q. Well, aren't they all in there?

A. No, rates are not down here.

Q. Suppose you look at—what land-grant rate was applicable there, do you know?

A. No, I don't know what land grant was applicable at that time.

Mr. Clark: Have we got Commission's Exhibits 1610 and 1631?

Mr. Paulson: You would like to have those, you say?

Mr. Clark: Yes.

By Mr. Clark:

Q. Don't bother with that for just a moment, Mr. Holmes.

Do you know the commercial rate, there are six bidders there, from mills to Fort Leavenworth?

A. No, I don't know.

Q. Where did you get the commercial rate from Iola to Fort Leavenworth which you used on your direct examination?

A. From the Commercial Traffic Branch Office of the Quartermaster General.

Q. Are you willing to assume that the commercial rate from Chanute, Ashgrove, Consolidated at Fedonia, Universal Atlas at Independence, and Consolidated at
21074 Mildred, Lehigh at Iola, from those points to Fort Leavenworth was 11½ cents a hundred weight or 47.7 cents per barrel?

21076 Q. You recall testifying in substance, don't you, if the commercial rate is deducted from the delivered price of $2.15? In that abstract you have before you the net f.o.b. bidder's price which would be $1.713. That is the rate from Iola to Fort Leavenworth of 42.7 cents deducted from the $2.15. Do you remember testifying that way?

A. I remember in substance that was my testimony.

Q. Then you recall testifying that by virtue of the Government destination bid there of $2.14

A. That is right.

Q. —the bidder would net $1.79287 per barrel.

A. That is right.

Q. That is to say, $2.14 minus the land-grant rate; is that right?

A. Yes.

Q. Of .34713?

A. That is right.

Q. Or approximately 8 cents more than it would have netted had the Government been able to realize the saving pursuant to the land-grant rate. Do you recall that?

A. That is right.

Q. What was the shipping point that controlled the bidding in that instance?

A. Shipping point that controlled bidding?

21077 Q. Yes. What was the competition that those mills were concerned with?

A. I don't know. I imagine the mills would have to answer that question.

Q. And you didn't take that element into consideration in your testimony, did you?

A. We are concerned primarily with buying cement as cheap as possible. We don't care anything about a man's competition.

Q. Very well.

Did you know that the rate from Bonner Springs to Fort Leavenworth, commercial rate, was 30.4 cents a barrel?

A. I probably knew it at the time. I wouldn't know that that is correct without referring to it.

Q. And that Bonner Springs is the location of a Lone Star mill, and the Lone Star was one of the bidders, wasn't it?

A. That is right, and I know that Lone Star mill is at Bonner Springs.

Q. Do you know what the land-grant rate was from Humboldt?

A. No, I don't know what that was.

Q. Do you know whether or not there is a cement company that ships from Humboldt?

A. Yes, Monarch.

Q. But Monarch did not bid on 268, did it?

A. No.

21078 Q. Well, it is in evidence here, Commission's Exhibit 1031, that the land-grant rate from Hum-

boldt to Fort Leavenworth was 8.248 cents per hundred-weight or 31.342 per barrel including the 7 percent emergency increase. You will find that in Commission's Exhibit 1031, and that rate is the lowest of the rates from Bonner Springs to Fort Leavenworth, Iola to Fort Leavenworth, Chanute to Fort Leavenworth, and Humboldt to Fort Leavenworth. Now, the Lone Star bid $2.15 f.o.b. Fort Leavenworth, didn't it?

A. Lone Star?

Q. Yes.

A. That is right.

Q. The commercial price then would be figured how, by you, from Bonner Springs?

A. $2.15—the commercial price?

Q. Well, the price at the mill.

A. The price they want plus the commercial freight.

Q. Suppose you deducted the commercial freight from the f.o.b. Fort Leavenworth bid. You would deduct 30 cents, wouldn't you?

A. Thirty cents. It is usual to drop the decimal.

Q. Dropping the decimal. Well, the commercial freight rate from Bonner Springs to Fort Leavenworth is 30.4 cents a barrel.

A. $1.85.

Q. $1.85. The other bidders had what commercial freight rates, do you happen to recall?

A. No, I don't.

Q. Well, the one you used was 43.7 cents?

A. Which one was that?

Q. That is the one from Iola.

A. That is the Lehigh, isn't it?

Q. Yes. 43.7, so the gross nets of the mills that bid there other than Lone Star, would be 13.3 cents less than the net at Bonner Springs, wouldn't it?

A. I don't quite follow.

Q. Well, the commercial freight from Iola to Fort Leavenworth is 43.7 cents a barrel. From Bonner Springs to Iola it is 30.4 cents a barrel.

A. Yes.

Q. So which of the mills would get the highest net at its mill?

A. Bonner Springs.

Q. Then by a little process of subtracting the difference between 43.7 cents and 30.4 cents, the two commercial

27079

freight rates, would be 13.3 cents, so it would follow, wouldn't it, that the mills that bid there other than the Lone Star mill got 13.3 cents less than the net at Bonner Springs?

A. That is right.

Q. All right. Now, that amounts to $1.73 per bar- 21080 rel, and the Bonner Springs net would be what?

A. $1.85 I think you said. You usually drop that fraction.

Q. You drop the fraction and it would be $1.85. Do you know whether there is a land-grant rate applicable from Bonner Springs to Fort Leavenworth?

A. I don't believe there is.

Q. But there is one from Humboldt?

A. Yes, I think there is part land-grant between Humboldt.

Q. Taking the 7 percent emergency charge that would be 29 cents, a little over 29 cents, Commission's Exhibit 1031 in evidence, indicates that the land-grant rate from Humboldt was 8.248 per hundred; it would be 31.342 per barrel, and including the 7 percent emergency increase.

A. Well, I don't see why we are concerned with Humboldt because Monarch did not bid on this proposal.

Q. Well, the land-grant rate from Humboldt to Fort Leavenworth of 31.342, deducting the 7 percent increase, would amount to 29 cents plus a decimal over, wouldn't it?

A. I don't know. I don't know anything about 21081 the Humboldt rate.

Q. Well, 31.342, take 7 percent of that and deduct it, you would deduct 2.19 plus from 31.342, so that it would be 29¼, about, which would be the lower freight rate, assuming that calculation is correct, the one from Bonner Springs, or the land-grant rate from Humboldt to Fort Leavenworth? I don't want to tax your memory too much, but the Bonner Springs rate was 30¾ cents and there is no land-grant rate applicable there. The Humboldt land-grant rate is 29¼ cents, so that the Humboldt land-grant rate is lower than the Bonner Springs, isn't it?

A. That is right.

Q. Now, freightwise, among Bonner Springs, Chanut, Humboldt to Fort Leavenworth, the cheapest rate available to the Government is from Humboldt to Fort Leavenworth, 29 cents plus?

A. I will assume you are right. I don't know that it is, but I will assume.

Trial Examiner Norwood: Why should this witness testify to those rates there that are already in evidence?

Mr. Clark: I am trying to get him to develop something. I am trying to have him admit, if he will, that the Government was deprived of nothing there, in the instance which we cite.

21089 Q. As I understood the answer that you gave to my last question, it was that the Government would get the benefit of the land grant rate, is that right, but would not get the benefit of any special rate?

A. No, it wouldn't get the benefit of the land grant rate unless the bidder had taken that land grant in consideration in submitting the bid, and we have no way to know that.

21103 Washington, D. C.
June 1, 1939.

21111 WILLIAM E. HAYGUE was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark.

21112 Q. Do you know the value of the public lands which were given to the railroads as of the date of the grants to the railroads?

21113 A. The approximate figure is $190,000,000.

Q. That is the value, is it?

A. That is the approximate value based upon selling prices of similar land in the same years in which the granted land was conveyed to the carrier.

Trial Examiner Norwood: That is not the present value, is it?

The Witness: No, sir; the present value probably could not even be estimated. As a matter of fact, much of the land which was originally granted has been disposed of by the grantee carriers.

By Mr. Clark:

Q. You do not purport to say what the value, however, of your knowledge of the value of any particular area or

section of the lands granted by the United States to railroads is as of the date of the grant, do you?

A. No, sir, I would not attempt that.

Q. You simply take the average selling price for the similar lands and assimilate them to the railroad grant lands?

A. That is the process.

Q. Those grants were made how, in solid blocks, Mr. Hayghe, or otherwise?

A. I am not prepared to say, definitely. Generally, though, I believe they were in alternate sections.

21114 Q. On each side of the right-of-way?

A. Alternating on each side of the right-of-way, in some instances extending back from the right-of-way twenty miles. They varied, though.

Q. Generally speaking, areas in which those land grants were made, were what?

A. The area west of the Mississippi, generally. Specifically from what is now the Twin Cities to Portland, Oregon, from Portland, Oregon, to Roseville Junction, California, from Goshen Junction, California, south, through the southern part of California, east across the States of Arizona and Mexico.

21122 Q. You gave some testimony, I think, about the purchase of cement, about being unable to get cement in small lots from the mills; that you had to have it from dealers, is that right?

A. That was the result of the examination of certain awards in some of the southern states, I believe.

21123 Q. Well, then, of course, in any testimony that you gave to the effect that on W.P.A. invitations, bids were in general not received from manufacturers, you did not intend to include any of the California or Pacific Coast mills because you certainly knew nothing about them?

A. I did not. I, of course, simply intended to include those of which I had made an investigation.

Q. That is right. And in any testimony that you gave to the effect that mills generally bid f.o.b. destination and attached control clause for Government destination cost, you did not intend to include any of the Pacific Coast mills because you made no investigation of the Pacific Coast mills with that in mind?

A. No, sir. My statement was based entirely upon those invitations I had examined.

21132 Q. The question, Mr. Hayghe, I am asking you is for your own views about this, and not what the Comptroller General has ruled or somebody else, but what you yourself think in the situations that I shall present to you, and I will present again the one that was 21133 before you when you left the witness stand for the recess.

Suppose that a bid is submitted by a cement company stating that a given price is f.o.b. destination, naming the destination, of course, and that the Procurement Division should subtract the commercial freight rate to obtain an f.o.b. mill rate, wouldn't that kind of a bid be both f.o.b. destination and f.o.b. mill at the choice of the Procurement Division?

A. As I answered a bit ago, there is a reasonable doubt as to just what type of bid you would have under the circumstances. Ordinarily, under an f.o.b. origin bid the buyer takes title to the property at the point of origin, it is his property while in transit, unless such an offer, I believe, were accompanied by a definite statement that the right is reserved to take title to the property at the point of origin, there will always remain a reasonable doubt as to just what kind of a bid you have and I think that would be up to someone more legally minded than I am.

21134 Q. Then your only doubt about that being either f.o.b. destination, or f.o.b. mill at the choice of the Procurement Division lies in the fact that you don't know whether the Government could take title at the mill?

A. That is my opinion, and as a matter of fact the payment of freight charges, of course, does not decide the title. I can pay freight charges on your property, but I don't acquire any property rights.

Q. That is quite right. That depends upon the terms of the contract.

A. That depends upon the terms of the contract.

Q. Now, going to another case or two, see what your answer is: If a cement company submits a bid stating that a given price is f.o.b. the destination and that the Procurement Division should subtract the commercial rate and land grant rate or special freight rate, whichever is lowest, to obtain an f.o.b. mill price, wouldn't that form of bid at

the choice of the Procurement Division be either an f.o.b. destination bid or an f.o.b. mill bid?

21135 A. I think the same premise would hold good there, as in the previous example; that in the absence of a passing of title——

Trial Examiner Norwood: Did you finish your answer?

The Witness: No, sir.

A. ——in the absence of a passing of title clause there would still be a reasonable doubt.

21143 Q. Well, the only point I want to make is this: Any shipper can go to the railroad and get the land-grant rates so far as the railroad company has the information between any two points.

A. Absolutely, no reason why he could not.

Mr. Wooden: Even as to whether it involves division sheet?

The Witness: Well, the rate, itself, would not disclose division.

Trial Examiner Norwood: But it would be based on division; is that right?

The Witness: In the case of a joint route, it would be based on the divisions.

Trial Examiner Norwood: That is, if a shipper asks a railroad for a particular rate to a particular destination?

Mr. Wooden: Land-grant rate.

The Witness: Yes.

By Mr. Clark:

Q. Even if they were participated in by several carriers jointly?

Trial Examiner Norwood: Yes.

A. They could give them the final rate without any question.

Q. Surely.

A. They would not have to disclose to the appli-
21144 cant for such information the factors which led up to it.

Q. It would not be necessary, would it?

A. No.

Q. Not at all.

The question of the correctness of the land-grant rate is ultimately for whom to decide, so far as the administrative departments of the Government and the railroads are concerned?

A. That is my understanding.

Q. No, who decides that?

A. Who decides what?

Q. The correctness of the rate so far as the Government administrative offices and executive offices are concerned, and the railroad, who decides between them finally and lastly what the correct rate is?

A. The Comptroller General of the United States.

Q. Primarily, the Government is interested in
21145 destination cost, isn't it?

A. That is the basis of railroads in every case.

Q. Well, if a land-grant rate is available to a bidder located at a great distance, say in California, conceivably, although this is a very extreme instance, he might be able to bid in competition with a bidder in Pennsylvania on commodities to be delivered at Washington, might he not?

Mr. Wooden: That is beyond the scope of the direct examination.

A. Washington, D. C.?

Trial Examiner Norwood: He explained it was an extreme case.

The Witness: It is rather a strained instance.

21146 By Mr. Wooden:

Q. Just one thing, you referred to the so called final rate given out by the railroads. I also understood you to say that that was not necessarily the rate on which the final settlement was made; is that correct?

A. It is very seldom the rate on which the final settlement is made.

21147 MAJOR HERMAN FELDMAN was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark.

21181 Q. I think you gave some testimony, on your direct examination, Major—you did, yes—that in an effort to get f.o.b. mill bids you issued circular letter No. 30, which is Commission's Exhibit No. 367 in evi-
21182 dence. Do you recall that testimony?

A. I do, yes.

Q. Is circular letter No. 30 in force now, or do you recall? Do you recall 30?

A. I would rather see it.

Q. I hand you a photostatic copy of Commission's Exhibit 367, purporting to be circular No. 30 (handing document to the witness).

A. Yes.

Q. Do you recall that?

A. Yes, I do recall it.

Q. Is that in force and effect now?

A. I don't believe it is now in effect.

21230 Washington, D. C.,
June 2, 1939.

21243 A. B. CUSTER was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark.

21257 Q. Has the Navy Department ever been deprived of the advantage of land grant rates on cement destined for the Navy Yard at Boston?

A. I couldn't answer that specifically that the Navy Department had been deprived. There are no land grant rates, no land grant railroads in the vicinity of Boston.

Q. That is right. No land grant rates available en route to Boston. That is from cement mills in the vicinity at any rate?

A. Eastern producing mills.

21258 Q. Eastern mills. Has the Department been deprived of land grant rates on shipments of cement to the Brooklyn Navy Yard?

A. I think the same situation exists.

Q. No land grant rates?

A. No land grant rates involved.

Q. What would your answer be with respect to the Navy Yard at Philadelphia?

A. Same answer.

Q. With respect to the Navy Yard at Annapolis?

A. The same.

Q. With respect to the Navy Yard in Washington, in the District here?

A. The same.

Q. With respect to the Navy Yard at White Plains, Maryland?

A. The same.

Q. Norfolk, Virginia?

A. The same.

Q. With respect to the yard at Sawell Point, Virginia?

A. Same.

21259 Q. Charleston, S. C.?

A. The same.

Q. Pensacola, Fla.?

A. There are land-grant rates involved.

Q. From New London, Conn.?

A. Beg pardon?

Q. New London, Conn.

A. No land-grant rates involved there.

Q. Newport, R. I.?

A. The same.

Q. Lakehurst.

A. Same.

Q. And Portsmouth?

A. Same.

Q. No land-grant rate?

A. No land-grant rate.

Q. As far as the Navy Yards at Boston, Brooklyn, Philadelphia, Annapolis, Washington, White Plains, Norfolk, Sowell Point, Charleston, New London, Newport, Lakehurst, and Portsmouth are concerned, there are no land-grant rates applicable on cement shipments to any of those navy yards?

A. From the points where the cement generally originates.

Q. That is righ. So that the only one of the naval stations that I have read to you, I mean navy yards, on which a land-grant rate would be applicable is Pensacola?

21260 A. I think that is correct.

21271 Q. When you testified before on direct examination, had you examined specifically invitations submitted to and bids made by Southern California companies?

A. I do not recall. I am under the impression that the review upon which my testimony was made was largely, if

not wholly, or bids made to eastern navy yards and stations.

21272 Q. Would the same statement apply, the statement you just made in your last answer, to invitations submitted to and the bids made by, if any were made, Seattle Cement companies, Portland cement companies—

A. Yes, it would.

Q. —and central California cement companies?

A. Yes.

21280 Q. My understanding of your testimony on direct examination, Mr. Custer, is that, with reference to Commission's Exhibits 378 to 382, inclusive, you testified or you had said that these bids constitute a cross-section of bids received by the Navy Department between the years 1931 and 1936. Do you remember your testimony along that line?

A. Yes, that is correct.

Q. Now, will you please examine the exhibit that I have mentioned, if you wish to do so, Exhibits 378 to 382,

21281 inclusive, and state whether or not f.o.b. mill prices were invited in any of them, and, if so, in what ones?

A. I would not feel free to make a statement with respect to any particular phase of a bid as applying to all bids in general.

As I explained before, we have general rules which are not inflexible. The fact that we did or did not specifically invite bids f.o.b. mill bids on one invitation does not necessarily follow that we did or did not invite bids in the same form on all other invitations.

21282 Q. What I am asking you to do is to state whether or not, Mr. Custer, the invitations contained in Exhibits 378 to 382, inclusive, called for f.o.b. mill prices at all.

A. You give me rather a tedious job.

Q. Well, I am sorry.

21285 Mr. Clark: Maybe we can shorten it in this way. I don't like to take up this time.

By Mr. Clark:

Q. Maybe we can shorten it this way, Mr. Custer: I am informed that those exhibits show that the invitation in each instance called for bids f.o.b. destination, and that in no instance was a bid f.o.b. mill called for; according to the invitations in those exhibits, constituting parts of those

exhibits. I don't know whether you would be willing to accept that statement as correct or not; a correct characterization of the exhibits, or not, but assuming it is a correct characterization would you wish to change your testimony to the effect that those exhibits constitute a cross-section of bids received by the Navy Department between 1931 and 1936, or would you wish to clarify that statement? Have I complicated it more, or not?

A. I think the statement is correct, that these bids do show a fair cross-section of the bids over the period.

Q. 1931 to 1936?

A. Yes.

21306 Q. You were concerned, in other words, with destination cost, is that it?

A. That is correct.

Q. Is that the only element or factor that you take into consideration when you are reviewing or considering

21307 said bids?

A. That is the controlling element or factor.

Q. That was not my question, Mr. Custer. Is it the only factor that you take into consideration—suppose two mills bid an identical price, one mill gives a discount of 10 per cent and the other one gives a discount of 2 per cent 10 days or 30 days, do you take that into consideration?

A. Well, yes, because that affects the delivery cost.

Q. Then bids are not identical, are they, if bids are put in that way?

A. They are not identical.

Q. There are numerous instances of that, aren't there, in bids received by the Navy Department?

A. There are numerous instances where the discounts do vary.

21308 Q. That is right, but they are not uncommon, not uncommon at all.

A. That there are variations in the bids.

Q. Although the dollars bid may be in the same amount in each bid?

A. That is correct.

Q. And the variations, if you find any, apart from price—assuming identity of price—the variations in the terms of the bid may influence the award, isn't that correct?

A. It is.

Q. The variation does, at times, influence the award made?

A. It does.

Redirect Examination by Mr. Wooden.

Q. Mr. Clark, when you speak of variation in discounts, how frequently has that occurred in the case of cement where you had identical bids, how frequently did the discounts or terms of payment vary?

A. In all of their variations, it occurs rather frequently. The variations are sometimes hair line, but there are variations.

21309 A discount, for instance, of 10 cents per barrel for 10 days after date of invoice. Another, 10 days after date of shipment. Now, they may be concurrent. In the majority of cases probably they are, but there are two variations.

Q. When you say "concurrent," what do you mean?

A. That the date of shipment is concurrent with the date of the invoice.

Q. In such a case what would be the extent of the difference in importance to the Navy Department or the buyer?

A. We give more weight to the discount offered from date of shipment. That is definitely ascertainable; the other is not.

21314 Q. Mr. Custer, is it uncommon for the terms of the sale and discounts to be identical on cement bids?

Mr. Withrow: Your Honor, we make the same objection.

Trial Examiner Norwood: The objection is overruled.

A. No, that is not uncommon.

By Mr. Wooden:

Q. Is it common?

A. Would you state the question again?

Q. Is it common for them to be identical?

Mr. Withrow: We make the same objection to the entire line of questioning.

21315 Trial Examiner Norwood: Yes, same ruling.

A. Common for them to be identical?

By Mr. Wooden:

Q. Yes.

A. Yes.

Trial Examiner Norwood: Go ahead.

Q. Now, Mr. Custer, has your department ever taken any steps to obtain f.o.b. bids from West Coast mills other than by the issuance of invitations, in particular, lettings?

Mr. Withrow: We object, Your Honor, because the invitations, themselves, are the best evidence.

Trial Examiner Norwood: He is not asking what are in the invitations.

By Mr. Wooden:

Q. Other than invitations.

Trial Examiner Norwood: The objection is overruled.

Mr. Clark: I shall object to the question unless it is specifically limited to the witness' personal knowledge, in this instance.

Trial Examiner Norwood: The answer will be limited to the witness' personal knowledge.

You may answer.

A. Yes, we have.

By Mr. Wooden:

Q. Will you state what?

21316 A. In general, that under certain circumstances it is highly desirable that we have mill prices, and for that primary purpose, in instances where we may want to ship the cement to our outlying stations in the Pacific, that we may take the cement at the mill direct and without clearing it at any of the outer stations.

Mr. Withrow: We move to strike the answer at this time because it is not responsive to the question and, furthermore, that the testimony of the witness is not the best evidence.

Trial Examiner Norwood: Read the question.

(Record read.)

Mr. Wooden: Isn't that for the examining attorney to object to, that it is not responsive?

Mr. Withrow: It is all hearsay testimony, moreover.

Trial Examiner Norwood: Your answer does not appear to be factual there, and the question asks for matter of fact. I shall allow the motion to strike the answer and ask you to give a factual answer to the question.

Off the record.

(There was a discussion off the record.)

Mr. Withrow: Your Honor, I understand we have our objection to this whole line of testimony?

Trial Examiner Norwood: Yes. Answer that first as to what steps you have taken, rather than through
21317 the regular investigations.

A. By communications, letters addressed direct to prospective cement mills.

By Mr. Wooden:

Q. West Coast mills?

A. Yes.

Q. When was that done?

A. It was done on several occasions. The last occasion probably two years ago.

21320 Mr. Custer, you were asked as to whether or not there were land-grant rates affecting Navy Department purchases for delivery at eastern navy yards. Do you know whether or not there are any special rates to the Government effective there that might be used on Navy Department deliveries in the East?

21321 A. I know of no special rail rates that might influence, available to the Government, which might influence prices to the navy yards in the East other than Pensacola.

Q. Mr. Custer, referring to Exhibit 378-C, reference is made there to standard form No. 31, and that bids must be submitted upon that form. This was as of June, 1931. Can you tell us whether or not standard form 31 as of that date included any request for an f.o.b. mill bid?

21322 A. The standard form 31, standing alone, does not specifically invite bids f.o.b. mill, standard form standing alone means nothing, though. It must be coupled with something else and that is the schedule.

21323 Trial Examiner Norwood: What is that something else?

The Witness: What we call in the Navy a schedule.

Trial Examiner Norwood: And that is in evidence?

The Witness: That is in evidence?

By Mr. Wooden:

Q. Can you say whether or not in 1931 the Navy Department requested bids f.o.b. mill on cement?

A. From recollection only, yes.

Trial Examiner Norwood: You can state that as to their general policy or practices?

The Witness: The general policy was to invite bids. Not in all cases, but in cases where it might serve
21324 a useful purpose.

By Mr. Wooden:

Q. Now, referring to page 21269 of the record where you read a portion of Respondents' Exhibit 228-A to C, for identification, beginning on the 6th line, what forms of the Navy Department is that taken from?

A. From the schedule.

Q. And how long has that particular sort of statement been included in your schedules?

A. Where the f.o.b. mill bid is invited, that is substantially the standard clause we have used for many years.

Q. Was it being used in 1931?

A. Yes, it was.

Q. Can you say whether it was being used in connection with these bids that I numbered 378 to 384, bids of the Navy Department?

A. The practice was common and there is no reason to believe that it was not used at that time.

Q. Is the absence of any such specific part of the invitation from the bids themselves any evidence to you that it was not used in that case?

A. If it is absent from the invitation, it was not used.

Q. Yes, but it is absent from the bids?

A. Well, the bid is made on the invitation, so that the two would be—

21325 Mr. Wooden: Nothing further.

Recross-Examination by Mr. Clark.

Q. You have been referring in your answers to Mr. Wooden to the language contained in Exhibits 228-A to C for identification, have you not, that I read to you this morning? Will you answer aloud so that the Reporter can get the answer?

Mr. Clark: That is the number of the exhibit, isn't it, Mr. Wooden?

Mr. Paulson: 228-A to C.

The Witness: Yes.

Mr. Clark: 228-A to C.

By Mr. Clark:

Q. I don't know which one this is, but I hand you Commission's Exhibit 378-A to X, inclusive, part 1, pages 2 to 10, and I show you, Mr. Custer, a schedule which accompanied an invitation on Form 31 for opening June 3, 1931, is that right?

A. That is correct.

Q. I show you that schedule and specifications, they were contained in the schedule, were they?

A. Yes.

Q. I call your attention to the language, if you will watch it, while I read it: "To be delivered, all
21326 transportation charges paid, to the Supply Officer, Navy Yard, Boston, (Charleston) Massachusetts, as may be ordered during the period ending December 31, 1931, in not less than carload lots (except with the consent of the contractor) each delivery to be made within 31 days after receipt of order from the Supply Officer." Now is that an f.o.b. destination or an f.o.b. mill invitation?

A. That is an f.o.b. destination invitation.

Q. Where is the language now in that sort of documents pertaining to that particular invitation which corresponds to the language that you have just been referring to in Exhibits 228-A to C, for identification?

21327 A. Under the paragraph headed "Important. In addition to the price stated above, bidders must state in the blank space provided the price per barrel if delivery is made f.o.b. cars or wharf at blank."

By Mr. Clark:

Q. Well, wouldn't that be Navy Yard Charleston in certain cases?

A. No, that would be mill.

Q. Mill?

A. It would be mill. "As may be ordered during the period ending December 31, 1931, in not less than carload lots except with the consent of the contractor, each delivery to be made within 15 days after receipt of an order from the Supply Officer, blank dollars per barrel. In submitting price for delivery at or near contractor's works, bidder must state on the blank line the exact shipping point of the material they propose to furnish."

21328 Q. That language that you have just read is found on the fifteenth page of this file of docu-

ments, Commission's Exhibits 378-A to N, inclusive, part 1, pages 1 to 20, is it not?

A. I think that is correct.

Q. And it is your contention that the language you have read constitutes an invitation to bid in the alternative, f.o.b. mill, is that right?

A. I wouldn't say alternative. An additional bid. We invite bids both way. We want the bid delivered, price delivered; another price at the mill.

Q. Let me show you again, Mr. Custer: I direct your attention to this: "To be delivered all transportation charges paid to the supply officer, Navy Yard, Boston, Charleston, Mass., as may be ordered," and so forth. Now, that was put in there by your department, was it not?

A. Yes, sir.

Q. And it is a part of the specifications and a part of the directions?

A. It is.

Q. If you will find in that set of documents anything which permits the bidder to deliver at any other place than at Charleston?

A. You are referring to Charleston only?

Trial Examiner Norwood: Was that language
21329 you read there typewritten into the blank, or is it a part of the blank?

Mr. Clark: I think it is printed, perhaps, and the name "Charleston" put in in typewriter, isn't it?

The Witness: It might be well for us to make sure that we are referring to the same document when you mention an invitation.

An invitation as we use it is invitation to bid for delivery to one or more navy yards. When you speak of the invitation to deliver to Boston, that is merely a part of the whole invitation.

By Mr. Clark:

Q. And that particular part of the invitation is contained in the specifications which are prepared by your division, or whatever your office is called?

A. That is correct.

Q. And are issued to the bidders?

A. Right.

Q. Bidders don't prepare them, themselves?

A. They don't.

Q. So that does call for an invitation to bid, so far as the Charleston requirement was concerned, f.o.b. Navy Yard, Charleston, doesn't it?

A. It does.

Q. And that is all it calls for?

21330 A. That is all.

21336 Q. Mr. Custer, I am handing you a collection of papers. Are those papers that I hand you among the papers which you brought in here today at the request of Respondents' Counsel, and were they on the list of such papers?

21337 A. These were the documents, part of the documents.

Q. What do the documents consist of?

A. Bids received on various openings for cement on the West Coast, navy yards and stations.

Q. I will ask you to examine those bids which you produced here at the request of Respondents' Counsel, and tell us whether or not the West Coast companies were requested to bid f.o.b. mill in those instances, and what they did with regard to that request?

Mr. Withrow: We object to that question. These documents were not used in the examination of this witness. The documents themselves, are the best evidence, and the documents are not identified in any way, so it would be possible to meet this kind of testimony.

Trial Examiner Norwood: Does Counsel for the Commission want to offer these documents in evidence?

Mr. Wooden: I asked the witness to refresh his recollection from them and testify concerning them. I am willing to have them offered, since Counsel for Respondents do not want to offer them.

Mr. Clark: I think we better proceed regularly if we are going into affirmative proof here.

21338 Mr. Withrow: This is not proper redirect examination, if the Court please. We object to it on that ground.

Trial Examiner Norwood: I am not so sure of that. Mr. MacIntyre? On that point let us not forget Mr. Clark did ask this witness whether or not in the last two years West Coast Respondents had been requested to bid f.o.b. mill and had refused to do so. This is directly in point with that question that Mr. Clark asked.

Mr. Clark: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: There is a question pending. Read it.

(Question read.)

Trial Examiner Norwood: There is an objection to that, and the objection is sustained. We ruled out that testimony a while ago because it is not the best evidence. It appears that the best evidence is in the hands of the witness and the Counsel for the Commission may offer it.

Mr. Wooden: We will offer it, Your Honor.

Trial Examiner Norwood: In view of the cross-examination, I think it is proper to have it offered when identified by this witness. I suggest that you select a few of them.

Mr. Wooden: There are only about four or five sets.

21339 By Mr. Wooden:

Q. There are only four sets; is that right?

A. Four sets.

(Thereupon, the documents referred to were marked for identification as Commission's Exhibits 3212-A to 3212- , 3213-A to 3213- , 3214-A to 3214- , 3215-A to 3215- .)

21340 Q. Are the papers numbered for identification as Commission's Exhibits 3212-A to blank, 3213-A to blank, 3214-A to blank, 3215-A to blank, the papers that you have been describing?

A. They are.

Trial Examiner Norwood: They are the bids from the files of your office?

The Witness: From the files of the Navy Department.

Mr. Wooden: Now, Your Honor, I will offer these bids in evidence and ask leave to substitute photostats for them.

21341 Mr. Withrow: Your Honor, we would like to object to Commission's Exhibits 3212-A to blank, being certain bids, opening day May 8, 1935, Commission's Exhibits 3213-A to blank, being certain bids, opening date May 26, 1938, Commission's Exhibits 3214-A to blank, being certain bids, opening date January 8, 1937, and Commission's Exhibit 3215-A to blank, being certain bids, opening date on May 18, 1937.

We object to these documents on the grounds that they are irrelevant and immaterial and not proper redirect, and on the further grounds that this is putting in only a part of the transactions from which this witness testified, that this in no way cures the record, the documents being offered are only cumulative of this great mass of documents over here, which has already been received in evidence. There are no new facts contained in any of them and it seems unnecessary at this time, after the Commis-
21342 sion has rested its case some month ago, according to them, to clutter up the record with an additional mass of documents which establish no new facts whatsoever.

For all these reasons we object to these documents and we object specifically to Commission's Exhibits 3212-A to blank on the grounds that it falls within the interim period immediately following the N.R.A. code.

Mr. Wooden: Apparently that interim period is still running.

Mr. Withrow: Well, maybe.

Mr. Clark: May I ask a question here?

Trial Examiner Norwood: Certainly.

Mr. Clark: I understand that it was intended that each group of documents under an identifying number relates to the same opening date, is that correct?

The Witness: That is right.

Trial Examiner Norwood: Any further objection?

Mr. Clark: I wish to join in the objection just urged by Mr. Withrow.

Mr. Wooden: Your Honor, these might very well
21343 be deemed cumulative on the general question, but as to the place occupied in the record by the Pacific Coast Respondents, they are not cumulative and that is the purport of Mr. Clark's deferred cross-examination, and these papers were brought in at his request.

Mr. Clark: My understanding is, if I may ask Mr. Wooden a question through Your Hono., that they are offered for the purpose of showing that invitations to bid f.o.b. mill were issued, is that right?

Trial Examiner Norwood: Were issued to the West Coast Respondents.

Mr. Wooden: And that they did not bid f.o.b. mill and I want to ask the witness if he will tell us to what extent the purpose that I announce is borne out by these documents.

Mr. Withrow: We object to that question.

Trial Examiner Norwood: I don't think he can state that, for the record. He can tell you that some place else.

(COM. EXS. 3212-A to 3212-EEE, inclusive, 3213-A to 3213-LLL, inclusive, 3214-A to 5-A, inclusive, 3215-A to 4-Q, inclusive, were offered and received in evidence.)

21344 Trial Examiner Norwood: The exhibits are to tell us, in regard to your question, Mr. Wooden.

Mr. Wooden: But some of these questions, you see, got into the realm of dispute and controversy and here is a witness who knows what he is talking about

Trial Examiner Norwood: You can ask him to explain anything on there that is proper for him to explain.

Mr Clark: We can all read English, if the Court please.

Mr. Wooden: But we don't all agree on what it means.

Mr. Withrow: It is a question for the Examiner and the Commission and the Courts to decide from the invitations, what the invitations request, and not for this witness.

Mr. Wooden: You don't want the man who knows most about it to tell, do you?

I will ask you, Mr. Custer, to take the bids that have been marked for identification and tell us whether or not the West Coast companies in those four cases were invited to bid f.o.b. mill and whether or not they did so.

21344½ Mr. Withrow: Your Honor, we object on the ground that the bids themselves that are in evidence are the best evidence and this is improper redirect examination.

Trial Examiner Norwood: Sustained.

Mr. Wooden: Your Honor, I merely say that the witness who knows more about that than anyone in this room is not now permitted to give us the benefit of the reading of those papers.

Trial Examiner Norwood: They will show.

Mr. Wooden: There is argument about it. The Respondent will contend one thing and we will probably contend another, and you won't let the witness help us on the matter.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: I think we are closing our eyes and ears to the best evidence.

Trial Examiner Norwood: Any further questions?

Mr. Wooden: If that question is not to be answered, I have no more questions.

21361 Washington, D. C.,
June 12, 1939.

21373 H. H. RICE was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

21376 By Mr. Clark:

21381 Q. You have with you, Mr. Rice, the invitations and bids on 300,000 barrels of cement, the invitations issued by the Engineer's Office of the War Department, and the cement to be used for Bonneville Dam, have you not?

A. I have.

Q. What do those papers consist of, briefly? Not the contents, just the documents, themselves.

A. I understand. Well, there is an abstract of the bids received.

Q. Yes.

A. And nine bids.

21382 Q. Is there anything in the file which shows the manner in which the bids were solicited?

A. Yes, sir; the invitation. The abstract shows only where they were received.

Q. Was there only one invitation issued for that 300,000 barrels?

A. One invitation but it was divided into certain schedules; schedules A, B, C, and D.

21383 Mr. Clark: I now offer, if the Court please, invitation on standard form 30, War Department, United States Engineer Office, dated March 13, 1934, Portland, Oregon, to bid on 300,000 barrels of cement for use at Bonneville, together with the abstract of the bids opened in United States Engineer Office, Portland, Oregon, March 23, 1934, in response to invitation for bids No. 34-543 dated March 13, 1934, for 300,000 barrels of Portland cement and ask leave to substitute a photostated copy or photostatic copies for the original papers.

Trial Examiner Norwood: Did the witness produce that abstract; that official abstract?

Mr. Clark: Yes, sir; it is on the table.

Mr. Wooden: I am not quite clear, Your Honor, whether this is one of the bids about which the witness gave any direct testimony. If it is one such bid I will have no objection to the offer of the invitation. If it is not, then I object as being beyond the scope of the witness' direct examination.

Until that point can be checked I will have to make my objection in that form.

Mr. Clark: Of course the purpose of the offer is to show non-identical destination prices and also f.o.b. mill bids, the inferences from the testimony having been
21385 that the delivered prices were identical and that the War Department couldn't get f.o.b. mill bids. Here is an instance where neither appear; the War Department got what it asked for.

Trial Examiner Norwood: Well, this is a different bid than that to which the witness testified here before.

Mr. Clark: I think it is. I don't think he mentioned this specific invitation or bid in his direct testimony.

Trial Examiner Norwood: You are bringing out through him, now, there were other bids and these other bids were different from the ones about which he testified heretofore?

Mr. Clark: But these don't sustain the generalization that arises from his testimony.

Mr. Wooden: In addition to that, Your Honor, as Respondents frequently mention, this is during the Code period and there is a large quantity of documents in the forms of telegrams and letters about this particular bidding, but this witness had nothing to do with putting those into the record.

Trial Examiner Norwood: He has identified them, however.

Mr. Wooden: Not the ones I am referring to. He
21385 didn't identify the other documents, the ones I am talking about. He probably never saw them.

Mr. MacIntyre identified them as documents from the file of the Code Authority, if I am not mistaken.

Mr. Clark: I don't understand that. You say this witness did not identify these particular documents?

Mr. Wooden: No; I am talking about the documents that consist of correspondence and letters about this Bonneville bidding.

Mr. Clark: I am concerned now only about the abstract and invitation in this particular situation.

Trial Examiner Norwood: You are offering these letters and telegrams that he refers to, there?

Mr. Clark: No. May we have an understanding on the record that the abstract is marked for identification and that the invitation is marked for identification? I am offering just those two documents; separately; nothing else in the file.

21392 (RESP. EXS. 233-A to 232-C, both inclusive and 233 were offered and received in evidence.)

21394 Q. Well, let me see if we can get it this way, Mr. Rice: Don't you know as a matter of fact that the District Engineer's offices, or some of them, issued invitations to bid in which they set out the basis for canvassing bids as follows:

"a. Bids will be submitted only on the basis of delivery, f.o.b. site of work," and describing the place; in this instance Balona Creek between Washington Boulevard and Redonda Boulevard, Los Angeles, Calif.

"b. Each bidder will state the location of the plant or plants from which delivery will be made, and the quantity to be delivered from each plant, if deliveries will be made from more than one plant."

Q. And:

"c. Bids containing conditions or submitted on
21395 any basis different than that set forth in subparagraph (a) will not be considered."

21396 The witness identified Resp. Ex. 234 A-J as a standard government form of invitation to bid.

21399 (RESP. EX. 234-A to 234-J, inclusive, was offered and received in evidence.)

Q. A moment ago, before the recess, you stated that you had not had any contact with the southern Cali-
21400 fornia cement business until "recently," I think the word was, and then subsequently, in response to a question of mine, you stated that that contact had arisen since you testified on direct. Now, do I state your testimony correctly?

A. That is my recollection.

Q. Well, then, of course, it necessarily follows, doesn't it, that at the time you testified before here on direct examination, you had not investigated any bids by southern California companies?

A. For deliveries in and around Los Angeles?

Q. That is right.

A. My recollection is that we had no requirements for cement there of any large quantities.

Q. Well, that is not quite an answer, although I think you intended to answer my question. The fact is specifically, you had not investigated before you testified on direct the question of whether or not the southern California companies had bid or how they had bid for deliveries in southern California?

A. That is my recollection of it, yes.

21401 Q. Now, by southern California companies, I mean, Mr. Rice, the California Portland Cement Company, the Southwestern Portland Cement Company, the Riverside Portland Cement Company and the Monolith Portland Cement Company, and the Santa Cruz Portland Cement Company, and your statement is that you had not investigated the bids on cement in southern California at the time you testified on direct, and that would apply to each one of those companies; wouldn't it?

A. It would apply to any company delivering or selling cement in that southern California area.

21409 *Redirect Examination by Mr. Wooden.*

Q. Just a question or two, Mr. Rice.

With regard to your familiarity with bidding on the part of the Southern California mills in the Los Angeles area do you make any distinction between bidding

21410 for delivery in that area by the Southern California mills and bidding outside that area by the Southern California mills?

A. I have never had any occasion to really notice anything of that sort. I take it what your question is is whether there is any difference of the bidding by the Southern California mills if they are bidding on Los Angeles requirements or Bonneville requirements.

Q. No, it is a question of the extent of your knowledge or familiarity with what the bids of the Southern California mills are like. Have you had some knowledge as to the bidding of the Southern California mills for delivery outside of the Los Angeles area?

A. No, I haven't.

Q. At the time of your direct examination, did your experience and observation cover the bidding of Southern California mills for delivery outside of Los Angeles?

21411 Q. Outside the Los Angeles area.

A. Well, I have no recollection at this time other than what might be in the record. I can't say now what that experience showed.

Q. Well, you wouldn't say that it didn't include anything with regard to the Southern California companies?

A. No.

Q. You just don't remember it?

A. I just don't recall. I know that there was some Bonneville abstracts, for instance, introduced. It may be some of them were in that period.

Q. By "some of them" what do you mean?

A. Some of these Southern California companies may have bid on that letting.

21412 *Recross Examination by Mr. Clark.*

21416 The witness identified Resp. Exs. 239 and 240 A-M as an abstract and form of invitation on in-
vitation No. E.R. 509-36-383, produced by him; Resp.
21417 Exs. 241 and 242 A-Q as an invitation 509-39-139 and an abstract to the bid which he brought; Resp. Ex. 243 as a large sheet of abstract of bids serial No. W-9-38-30 which he brought; Resp. Exs. 244 and 245 A-P as an abstract of bids and invitations relating to invitation No. 509-39-140 which he brought; Resp. Exs. 246
21418 A-B, 247 A-E as an abstract of bids and invitations relating to invitation No. 509-30-187 which he brought.

Redirect Examination by Mr. Wooden.

21419 The witness identified Com. Exs. 3216 and 3217 as among the papers which he brought in here this morning at the request of Petitioners' counsel; Com. Ex. 3216 as an abstract of bids furnishing cement to the Los Angeles district opened September 10, 1935; Com. Ex. 3217 as an abstract of the bids received by the District Engineer, Tucumcari, N. M. opened September 4, 1936. He identified Com. Exs. 3218 to 3225 inclusive as papers which he produced here this morning at the request of counsel for the Petitioners and as abstracts of various openings of bids for cement in Los Angeles which came from the files of his department.

21420 PERCY I. TAYLOR was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark.

21421 Mr. Taylor, you have brought with you, have you, documents or some of them which were called for in the subpoena served on you before you went away?

A. Yes.

Q. And what documents have you; first, let me ask, when you produce the documents, before you answer the question, I wish to ask you a preliminary question.

A. I have a large part, the larger part of the documents asked for by the subpoena; the Bureau of Reclamation purchases.

Q. You did not bring any Indian Affairs or National Parks?

A. No, I did not bring them with me this morning.

Q. Just Bureau of Reclamation documents?

A. Yes.

Q. Will you produce them, please.

Trial Examiner Norwood: Did you bring everything that you could, within the time that you had?

The Witness: Yes, sir.

(The witness produces documents.)

By Mr. Clark:

Q. In what order have you arranged them? In the order in which they appear in the subpoena?

A. Yes.

Q. Have you examined them, yourself, Mr. Taylor?

A. No, sir.

21422 Q. You have made no examination of them since they were gathered for you?

A. Simply to check the invitation numbers, that is all, against the list on the subpoena.

Q. Bearing in mind the generalization that you made in your testimony that the prevailing basis of bidding was f.o.b. destination, I wonder if you would wish to examine these documents before you return them this afternoon, sufficiently enough to say whether or not you want to correct your statement?

A. That was f.o.b. destination after the code, and covered only the purchases of cement which I handled in Washington.

Q. Again, let me repeat: Do you wish to examine these documents sufficiently during the noon hour between now and 2 o'clock to see whether or not when you return this afternoon you wish to correct your statement in any way?

Mr. Wooden: Your Honor, unless these documents are first shown to relate to the period that the witness—

Mr. Clark: If Counsel will just bear with me a moment. I want to shorten it just as much as I can.

Mr. Paulson: We have been through this twice, Your Honor.

Trial Examiner Norwood: Let Counsel complete his statement.

By Mr. Clark:

21423 Q. Do you wish to do that, Mr. Taylor? I don't want to place any burden on you.

Mr. Clark: What I am trying to avoid, if the Court please, is to have this witness go through every one of these documents in the courtroom. I am perfectly willing to take that time. When I say "willing," I will do it if I have to.

A. The examination of these documents wouldn't change my original statement.

Mr. Clark: I will have to put the documents in evidence, then.

Trial Examiner Norwood: Why wouldn't that change your statement?

The Witness: Because practically all of these invitations cover purchases of cement which I did not handle.

By Mr. Clark:

Q. You mean by that which did not amount to $10,000?

A. I don't believe there are over—a very small percentage of these came into Washington. Most of them were awarded in the field.

Q. I want to get this: You say first you did not handle. Do you mean by that purchases which amounted to less than $10,000?

A. Yes, sir.

21427 Trial Examiner Norwood: I thought that you wanted this witness to go over them during the recess.

Mr. Clark: I would like to have him do that, if we can. Here is what I should like to do. I should like to go through these documents with the witness on the witness stand or have him go through them off the witness stand and then testify as to the contents of the documents in certain particulars. Now, that will expedite this matter. The documents are here. Counsel for Commission can ex-
21428 amine them to see whether or not the witness is testifying correctly. Now, if they don't want to do that, I shall be put to the necessity of trying to get these documents into evidence. I can state to Your Honor what the contents of the documents generally are so far as the California Portland Cement Company is concerned. There are 40-odd instances of bids by the California Portland Cement Company, in every instance an f.o.b. mill bid. Now, on the basis of that, I want to get this witness' testimony as to whether or not his generalization applies to the California Portland Cement Company.

Mr. MacIntyre: That wouldn't answer the question. There may be 500 other bids in which his testimony would apply.

Mr. Clark: Well, we will have to take that when we come to it.

Trial Examiner Norwood: I understand it is logical to bring this in as a modification of his general statement. It wouldn't be relevant to show that there weren't some other particular instances where they refused to bid f.o.b. mill, just because they show here that here are some cases where they did. Those two propositions may both be true at the same time.

21429 Mr. Clark: Well, I wonder, if the Court please. It seems to me they are mutually exclusive. Now, the witness testified that—

Trial Examiner Norwood: No, not mutually exclusive.

Mr. Clark: Well, the witness has testified that the prevailing basis of bidding was f.o.b. destination. Now, if the California Portland Cement Company didn't bid f.o.b. destination, obviously, that generalization of his can't apply to that company.

Trial Examiner Norwood: Prevailing. He didn't testify that that was the case in all cases.

Mr. Wooden: He might have said that in 90 per cent of the cases it was f.o.b. destination. You bring in a thousand

cases and they may come under the 10 per cent. You may bring in a thousand cases that come under the 10 per cent.

Mr. Withrow: But the witnesses didn't make the statement which Mr. Wooden just made.

Mr. Wooden: I know he didn't. I said, assuming that he did.

Mr. Withrow: We can't assume that he said that. He said that he didn't get f.o.b. mill bids, and here are f.o.b. mill bids, forty-four some odd.

Mr. Clark: Forty-four or forty-six that I counted.

21430 Trial Examiner Norwood: If he had said that these mills did not in every case bid f.o.b. mill, then your testimony here which you offer to show, and if it is such testimony as you offer, would contradict it.

Mr. Clark: Well, if the Court please, that is the substance of his testimony.

Mr. Wooden: No.

Mr. Clark: The substance of his testimony, that he didn't get f.o.b. bids.

Mr. Wooden: No, no, never.

Trial Examiner Norwood: Did you testify that the refusal to make f.o.b. mill bids was an invariable practice?

The Witness: No.

Trial Examiner Norwood: That that was the case in all cases of bids?

The Witness: No.

Trial Examiner Norwood: What was the substance of your testimony?

The Witness: On direct testimony, as I recall, I said that the cases that came into Washington for award after the Code, the tendency was to bid f.o.b. destination, and I had no companies in mind. I covered all companies.

Trial Examiner Norwood: What do you mean by "tendency"? That is some case, most cases, or all cases?

21431 The Witness: Most cases, and those were the cases which I handled here at Washington.

Mr. Clark: If I understand the logic of this situation, the witnesses' testimony being that in most cases they were, that means more than 50 per cent of the cases that they bid f.o.b. destination, to pin it right down to hard logic. Now I am offering this to show that in more than 75 per cent of the cases when the California-Portland Ce-

ment bid, and I will go so far as to say in all but two of the cases, it bid f.o.b. mill when it could have bid, under the form of invitation, f.o.b. destination. Instead of doing that, it bid f.o.b. mill.

Trial Examiner Norwood: These documents you offer there show the nature of that f.o.b. mill bid?

Mr. Clark: Yes.

Trial Examiner Norwood: Whether it is a derived bid or—

Mr. Clark: It does.

21432 Trial Examiner Norwood: Well, you may show that.

Mr. Wooden: Your Honor, I have never contended, and I have said frequently that we never intended to infer that it was an invariable rule that they quoted f.o.b. destination.

21436 *Cross-Examination by Mr. Clark (Resumed).*

Q. Mr. Taylor, will you get the documents relating to invitation No. 13905-A, destination Werkel, Washington, the opening date being 3/26/30. It is the Yakima project. Do you find it?

A. Yes.

Q. What documents have we relating to that? It shows the Spokane bid, does it, and the invitation?

(The witness produces a document.)

21437 Q. That is the contract. We are not interested in that.

A. It shows the bid of the Pacific Coast Cement Company.

Mr. Little: What is the date of that, Mr. Clark?

Mr. Clark: The opening date is 3/26/30. The date of the invitation is 2/11/30.

21438 Q. Now, is the document which I hold in my hand here, being Respondents' Exhibit 249-A and following, documents which you examined before you gave your testimony on direct?

A. No, sir.

Q. They are not?

A. No.

Mr. Clark: Well, I offer this in evidence, if the Court please, it being the invitation and bids.

21439 *Examination on Voir Dire by Mr. Wooden.*

Q. Mr. Taylor, referring to Respondent's Exhibit, for identification, 249-A to F, did you handle the transaction that is represented by those papers in the course of your official duties?

A. No, sir.

Q. Did you know anything about the transaction at the time it occurred?

A. No, sir.

Q. Did you give any testimony concerning it on your direct examination?

A. No.

Mr. Wooden: I object, Your Honor, on the ground that it is an effort to get in through this witness documents that are not comprehended within the scope of the witness' general examination, direct examination, and, furthermore, that if this document is admissible at all it is not on the deferred cross-examination of this witness but only as a part of Respondents' case in chief. The witness' testimony is that he didn't handle these papers, and he didn't handle the transaction; he knows nothing about the transaction—that is the purport of it—and makes it clear that this is not cross-examination as to this witness. Furthermore, the witness' direct examination was confined,
21440 as I understand it, to the post code, or the code period, and not prior to the code, and this is 1930 and the years prior to the date on which he said he began handling these matters, in 1931.

Mr. Clark: The testimony was, as I recall, about 10 years.

Cross-Examination by Mr. Clark (Continued).

Q. That is one of the documents that you produced in response to the request made upon you, isn't it?

A. That—

Trial Examiner Norwood: Well, now, it seems to me that Counsel is right about that. We are getting rather far afield on this as cross-examination. Now, you can introduce that when you put in your case, but this witness had nothing to do with it. It is not connected at all with his previous testimony, and while it might be relevant

and admissible and desirable when you put in your case, I don't see that now. I shall sustain the objection and not receive this paper.

21441 Q. Your testimony is that you had no difficulty about f.o.b. mill bids before the Code, is that so?

A. Before the Code, as I recall, most of the bids were f.o.b. mill. There may have been some the other way.

Q. As far as the Pacific coast companies, do you recall how they were or what your testimony was with respect to them?

A. Not particularly. I believe my testimony was that before the Code we usually asked for bids f.o.b. mill.

Q. And got them?

A. Yes; I believe we did.

21446 Q. Now, will you get for us from the documents that you produced here, invitation No. 42558-B, Salt River project, the opening date, March 20, 1936.

21447 Q. Let us pass that for a minute, Mr. Taylor.

A. I have it now. It was one that was listed twice, and that is why I couldn't find it.

Q. Does that show the invitation; who the bidders were?

A. Yes. Apparently we have a copy of the complete abstract here.

Mr. Clark: The witness has handed me a document marked for identification Respondents' Exhibit 295-A to J, inclusive.

By Mr. Clark:

Q. Did you have that document before you at the time you were making your preparation to testify on direct examination, or that transaction? Was it called to your attention?

A. I can't say whether this was one of the cases that was introduced as an exhibit.

Q. Am I to understand that the only ones that were called to your attention before you testified were the ones that were introduced in evidence?

A. There was nothing called to my attention.

Q. The only ones you examined preparatory to giving your testimony?

A. I didn't prepare to give any testimony.

Q. You don't remember whether the document which you hold in your hand, Respondents' Exhibit 295-A to J, inclusive, was examined by you at any time?

21448 A. I don't—I am not sure that it was, but it probably was because it was awarded in 1936 and came into Washington—

Q. That is for more than 10,000 barrels.

A. Yes. That would have been awarded here in Washington or approved for order in Washington.

Mr. Clark: Now, I want to offer a part of this exhibit, if the Court please, which, with the abstract that is already in evidence, will make the story complete. I want to show what the invitation called for, so I am going to offer the first page of Respondents' Exhibit 295, which is Respondents' Exhibit 295-A and B as showing the form of the invitation that was issued in that instance.

Trial Examiner Norwood: And that connects up with what Commission's exhibit?

21449 Mr. Clark: 118-B.

Mr. Clark: He has so testified, as I understand his testimony.

Let me revise that offer to include 295-A to I, inclusive. That excludes J, only, so that makes it complete.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 295-A to 295-I was offered and received in evidence.)

21450 By Mr. Clark:

Q. Now, will you get for us, Mr. Taylor, invitation No. 42682-A, Salt River project, opening date 4-9-37, invitation date, March 30, 1937.

Q. Do you have that?

A. Yes.

Q. Has that an abstract attached to it?

A. Yes.

Q. Where?

A. (Indicating.)

Q. Oh, yes.

Q. Was this one of the 15 that were introduced in evidence? Have you any way of recalling?

A. No, I wouldn't. I couldn't tell whether that was one of the 15 or not.

21451 Q. Well, is it one of the documents that you examined, came across your desk in the regular course of your duties, or in any way across your desk before you testified here?

A. Yes.

Mr. Clark: All right. I offer in evidence these papers marked now, for identification, Respondents' Exhibits 297-A to N, inclusive, if the Court please. I will tell you, Your Honor, so that Your Honor will not be in the dark about these: These were all f.o.b. mill bids, and the invitation on its face shows an invitation f.o.b. mill and/or destination.

21453 *Examination on Voir Dire by Mr. Wooden.*

Q. Will you point out to me, Mr. Taylor, where the invitation called for bids f.o.b. mill or destination as the case might be?

Mr. Clark: The invitation, of course, speaks for itself, but I have no objection to his trying to interpret it.

By Mr. Wooden:

Q. Is it in the alternative?

A. Yes.

Mr. Clark: It is in the conjunctive and alternative, isn't it?

The Witness: That is correct.

By Mr. Wooden:

Q. Do I understand, Mr. Taylor, that you handled this transaction represented by these papers?

A. Yes.

Mr. Wooden: No objection.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 297-A to 297-N was offered and received in evidence.)

21455 By Mr. Clark:

21456 Q. Will you get invitation No. 44080-A to February 3, 1936; Parker Dam; a 25,000-barrel invitation? Do you have it?

A. Yes.

Q. Does that have an abstract attached to it?

A. Yes.

Mr. Clark: The witness has handed me, if the Court please, a document marked Respondents' Exhibit 273-A to H, inclusive.

By Mr. Clark:

Q. That has only a partial abstract?

A. A partial abstract.

Q. That, however, is a transaction which went across your desk?

A. I believe it did. The bids were opened in 1936 and the amount is over $10,000.

Q. Do you recall what the California Portland Cement Company bid; whether f.o.b. mill or f.o.b. destination? The documents are not there to show it; but do you recall it?

A. No, I don't.

Q. Do you recall what the Riverside Portland Cement Company bid?

A. No.

Q. Do you recall how the Southwestern Portland Cement Company bid?

A. No.

21458 (RESP. EX. 273-A to 273-H was offered and received in evidence.)

21459 The witness identified Resp. Ex. 292 A-L in-
21460 clusive as a document with an abstract of bids for the Boulder City project attached to it, calling for 12,000 barrels, B23278-A, the opening dated being April 9, 1937. The abstract was a copy of Bureau of Reclamation abstract containing seven bids. This was one of the sets of papers that came across his desk in his official position.

21462 (RESP. EX. 292-A to 292-L was offered and received in evidence.)

21465 The witness identified Resp. Ex. 296 A-N as invitation No. 42652 B, dated January 5, 1937, for the Salt River project involving 12,000 barrels and a complete abstract which came into Washington for approval of award and which he had probably handled.

Q. Let me look at that just a second.

Now I will ask if you will notice the California Portland Cement Company, the character of the bid and the character of the invitation.

A. Yes.

Q. I call your attention to the fact that the invitation is in the conjunctive and alternative and that the bids are f.o.b. mill bids according to the abstract. I didn't look at this circle down here. The California Portland Cement Company, according to the abstract, provides what? Colton?

21466 A. The abstract shows f.o.b. point Colton, California.

21467 (RESP. EX. 296-A to 296-N was offered and received in evidence.)

21467 The witness identified Resp. Ex. 290 A-H as one of the sets of documents which he believed passed across his desk relating to that transaction.

21468 (RESP. EX. 290-A to 290-H was offered and received in evidence.)

21476 By Mr. Clark:

Q. Did you have that bid of the California Portland Cement Company in response to invitation, which is in evidence, marked Exhibit 296-A, before you gave your testimony on direct examination? Do you remember whether you did or not?

A. The bid itself—

Q. The bid itself, not the abstract.

A. I probably did because these bids were opened in January, 1937.

Q. I now hand you a document marked as Respondents' Exhibit 302-A to J, inclusive, and ask you to examine it, please, and then answer the question.

21477 Q. This is one of the sets or one of the documents that was before you before you testified here on your direct examination, was it not?

A. It probably was, yes.

21478 (RESP. EX. 302-A to 302-J, was offered and received in evidence.)

21481 Washington, D. C.,
June 13, 1939.

21522 PERCY I. TAYLOR was thereupon recalled as a witness for the Commission and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark (Resumed).

21525 Q. Have you got invitation No. 42613-A, dated September 21, 1936, on the Salt River project?

A. Yes.

Q. Please examine the form of invitation there, and the character of the bid by California Portland Cement Company. These are documents produced by you, are they?

I am referring to a document marked as Respondents' Exhibit 302-A to J, for identification, inclusive.

A. Yes.

Q. These documents were before you at or before the time you gave your testimony on direct, which ended December 17, 1937?

A. Yes.

21528 The witness identified Resp. Ex. 290 A-H as invitation No. 23236-A, dated December 10, 1935, for the Boulder Canyon project. This was probably handled by him in Washington at or before the time that he gave his testimony in December 17, 1937.

21531 Q. Mr. Taylor, with respect to the practice of the Bureau of Reclamation at Washington, I understood you to say the other day that purchases of cement involving $10,000 or more delivered cost, Government destination cost, were made by the Bureau at Washington. Is my understanding correct?

A. No, the contract price is what governs, not the net delivered cost.

Q. All right. Then if the contract price for a purchase of cement is $10,000 or more, that purchase is made by the Bureau at Washington; is that the correct statement of it?

A. The award of contract is approved here in Washington.

Q. Very well.

A. Yes.

Q. And those documents are generally, at any rate, examined by you; is that right?

A. Yes.

Q. Or by you and your staff?

A. Yes.

21532 Q. With respect to contracts for purchase of cement in an amount less than $10,000, those contracts are made in the field somewhere, are they?

A. In our Denver office.

Q. In your Denver office. What evidences of them is in the Bureau at Washington?

A. The copy of the contract made by the Denver office with the successful bidder.

Q. And any abstract?

A. Only occasionally do they send a complete abstract in with those awards.

Q. Well, you know, do you not, that there were from the

close of the code period to the date on which you testified here, December 17, 1937, at least 19 instances of the California Portland Cement Company being invited to bid either f.o.b. mill and/or destination and bidding f.o.b. mill in addition to the instances that we have in the record in the form of evidence? Do you understand that question?

A. Yes. I don't know that they bid f.o.b. mill. I know that they bid in numerous cases on our invitations during that period, but I do not—

Q. Well, will you get invitation numbered B-14595-A, the date being August 17, 1936, for the project at Yuma.

Mr. Paulson: Is that quantity involving $10,000?

Mr. Clark: Less than $10,000, 150 barrels.

21533 Q. And that contract or the evidence that you had in the Bureau was in the Bureau at the time you gave your testimony here in December, 1937, wasn't it, Mr. Taylor, if the contract was awarded to the California Portland Cement Company?

21534 A. I presume that it was. Those contracts are sent in here a considerable time after the award, from 30 to 60 days after the award is made in Denver, a copy of the contract.

Trial Examiner Norwood: Well, do you have anything to do with those contracts, and did you base any of your former testimony on them at all?

The Witness: No.

21536 Mr. Shefelman: I have before me the record of Mr. Taylor's testimony on direct examination. I am going to first read this so that the record will contain the portion I am reading, and then, in all fairness to Mr. Taylor, I would like to have him examine this, also; just a portion of one page.

I will first read a question, which is as follows:

"Q. As I understand it, that covers a period from 1927 down to April, 1933.

"A. Yes."

Now, we come to the period subsequent to April, 1933.

21537 "Q. What has been the situation since that time —I will put it this way: What has been the situation with regard to getting f.o.b. mill bids since the Code?

"A. Well, we ask for bids f.o.b. shipping point and/or destination. We have received bids both ways.

"Q. Do you get a so-called Government destination

bid when you ask for a destination price; is that the way it is done?

"A. We do not ask for destination price alone, we ask both ways, but we receive either; sometimes mill, sometimes destination.

"Q. Can you say which way the prevailing basis of quotation is, whether it is mill or delivered?

"A. Destination.

"Q. Destination.

"A. Yes.

"Q. Do you consider the cases where they quoted f.o.b. mill as exceptions to the general rule?"

Then there was a colloquy between Counsel, and then the witness answered:

"A. I will answer that by saying to the best of my recollection most bids are f.o.b. destination."

By Mr. Shefelman:

Q. Now, you may use that to refresh your own recollection with, Mr. Taylor, so that there will be no question about your knowing what I have reference to, and 21538 let me ask you this question, if I may:

You speak, in the course of this interrogation, with reference to the situation, the question being:

"Q. What has been the situation with regard to getting f.o.b. mill bids since the Code?"

Then you say:

"A. Well, we ask for bids f.o.b. shipping point and of destination."

In making that response to that question, Mr. Taylor, did you have in mind the general experience of your department with its bids?

A. No.

Q. Was it your intention to limit your answer, therefore, only to those specific instances where you, yourself, had actually passed upon the particular bids submitted in response to a call for bids?

A. Yes.

Q. Therefore, I judge that you did not intend to state what the prevailing practice was, generally, but what the prevailing practice was with reference to those few cases that you had had personal experience with? Am I correct?

A. Yes. The cases that came to Washington for award.

Q. And you had no intent to pass upon the prevailing practice in it to the many contracts which did not come to your particular attention?

21539 A. I did not refer to those that were awarded in Denver or in the project offices.

Q. And you attempted to give no opinion upon the prevailing practice in those cases, did you?

A. No.

Q. Numerically, there are many of those cases, are there not?

A. Yes, there are.

By Mr. Clark:

Q. Right in line with Mr. Shefelman's interrogation of you, Mr. Taylor, what are the cases that you examine, personally, $10,000 and over?

A. I couldn't answer that. There are a great many.

Q. There are fifteen that were brought in here and introduced in evidence, to begin with, are there not?

A. There were fifteen, I believe, introduced.

Q. If that is the correct number. There was a group of fifteen, is that right?

Mr. Clark: Counsel for the Commission nodded his head in the affirmative.

By Mr. Clark:

Q. You told me here, you had made out a list of

21540 about thirty.

A. Yes.

Q. Did that list of thirty, as you now recall it, embrace all the cases you had personally worked on?

A. No.

Q. How many were there?

A. I have no idea. I couldn't even—

Q. Have you brought in here all of the cases, $10,000 or more, relating to the California Portland Cement Company?

Mr. Paulson: What period are you speaking of?

Mr. Clark: I am speaking of the period since the Code.

A. I brought in all the cases involving the California Portland Cement Company that were listed on the subpoena so far as we have been able to find them in the files.

By Mr. Clark:

Q. You don't know whether there are any others, or not?

A. There may be a very few, but we haven't been able to find them yet.

Q. If California Portland Cement Company said that those were the only ones, would you dispute it, on your present knowledge?

A. I couldn't dispute it, no.

Q. Would you dispute it on your knowledge at the time when you testified before?

21541 A. I wouldn't dispute it, no.

Q. Is there any way that we can ascertain, Mr. Taylor, quickly, what bids you did work on?

A. Why, no, except that I have worked on all bids involving over $10,000.

Q. But there is no way now that you can tell us what those bids were?

A. You mean as to the—

Q. As to the companies?

A. As to the companies involved?

Q. Yes.

A. No; I can't from what I have with me. I have a number of cases, here, involving over $10,000 in which other companies than the California were interested, that were listed on this subpoena.

Q. I am interested, at the moment, in inquiring only about the California Portland Cement Company.

A. I see.

Q. You don't know what number of bids were made by the California Portland Cement Company and settled away from Washington, would you, of less than $10,000?

A. No, I wouldn't have any idea as to the number.

21550 PERCY I. TAYLOR thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Little.

Q. Mr. Taylor, when I stated that Respondents' Exhibits 200-D and E included, in our opinion, all of the invitations for cement ordered by the Reclamation Bureau for the State of Washington, I did not include the Coulee invitations which are set forth on Respondents' Exhibits 200-B and C. I merely state that for your own information, and for the information of Counsel.

Will you now produce, Mr. Taylor, invitation No.
21551 15008-A? Do you have it, Mr. Taylor?

A. Yes.

Mr. Little: I would like to have this marked for identification.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Little: The Reporter tells me that that has already been marked "Respondents' Exhibit 264-A to H, inclusive.

Trial Examiner Norwood: Yes.

By Mr. Little:

Q. I will ask you to state what that exhibit consists of.

A. It is a copy of a contract relating to cement for the Yakima Kittitas irrigation project.

Q. What was the date of the invitation?

A. July 8, 1926.

Q. And what was the date of the opening of the bids?

A. June 28, 1926.

Q. What was the quantity of cement asked for?

A. Ten thousand barrels.

Q. What was the destination? It was Ellenberg, was it not, Mr. Taylor?

A. I was looking for that. It probably would be.

21558 Mr. McIntyre: If Your Honor please, during that period of 1927 to 1933 I imagine that we would accept the witness' statement that appears at line 12, page 242, in which he says that during the period 1927 to 1933 that out of 15 instances, 14 of them were f.o.b. mill bids; 15 different sets of bids.

Now, of course, that was prior to the Code. Of course we would accept this witness' testimony to that effect. They are just merely encumbering the record and delaying the case by adding or attempting to add to that because we are conceding that.

21560 (RESP. EX. 264-A to 264-H was offered and received in evidence.)

By Mr. Little:

Q. I call your attention now to the abstract which is Respondents' Exhibit 264-H, and will ask you to state how the Superior Portland Cement bid on that opening.

21562 By Mr. Little:

Q. I will ask you now what your statement is, Mr. Taylor, with reference to the bid of Superior Portland Cement, Inc., in the light of your general statement on direct examination.

21563 A. According to the abstract, the Superior Portland Cement Company bid f.o.b. shipping points.

Q. In fact, all of the bidders bid f.o.b. bill, did they not?

A. Yes.

Q. And, furthermore, Mr. Taylor, is it not a fact that the laid-down costs to the Government under all of the bids were non-identical on this opening?

21564 A. This abstract shows that there were no identical bids.

Q. That is all on that exhibit. You are speaking now, when you say no identical bids—you are speaking now of the cost to the Government.

A. Yes.

Q. The delivered cost to the Government.

A. That is correct.

21565 Mr. Paulson: His testimony is, and I think the witness will correct me if I am wrong, that prior to 1933 the majority of the instances he received f.o.b. mill bids, and we are willing to concede, as I understand 21566 it, and Mr. MacIntyre has proposed it, and Mr. Wooden didn't deny it, that in the majority of the instances they did bid f.o.b. mill prior to the code. Now, Mr. Little could proceed and throw some light on this case if he would guarantee that all of the bids prior to the code

are here, that he has them all, because then we would know the complete story. Mr. Wooden said he couldn't consent to the stipulation that all of the bids were f.o.b. mill bids. Now, he is not going to prove that they are all f.o.b. mill bids, obviously, because he isn't able to say that they are all here. I don't see why we should proceed. We are willing to admit, as I understand it, that most of them are f.o.b. mill. Now, he is merely telling that some of them are.

21570 Mr. MacIntyre: It can be taken that this witness has testified in many cases the Northwestern and Superior have submitted f.o.b. mill bids; that they did not refuse to bid f.o.b. mill and the record so shows at this time and to again say that the witness would not so state, of course, I think is throwing some insinuation on his past testimony.

By Mr. Little:

Q. Mr. Taylor, is it not a fact, based upon the records from your office, that neither Superior Port and Cement nor Northwestern Portland Cement ever declined to bid f.o.b. mill when requested by the Bureau of Reclamation in a period prior to the Code?

A. I couldn't make a direct answer to that ques-
21571 tion with regard to those particular companies.

When I testified on direct examination I had no companies in mind, no particular companies in mind; I was just making a general statement that prior to the Code and to the best of my recollection most of our invitations were f.o.b. mill and we received, in most cases, f.o.b. mill bids.

There may have been exceptions to that, but I can't—

Q. Do you know of any instance, Mr. Taylor,—

A. I don't, without—

Q. Let me finish the question.

Do you know of any instance where a company in western Washington bidding on a reclamation project for use of cement in the State of Washington declined to bid f.o.b. mill?

A. No.

21573 Q. Will you now produce, please, invitation No. 33539-A? That is the invitation number on the top of Respondents' Exhibit 200-E.

Mr. Little: I will say to your Honor and to Counsel that I have refrained from asking about invitation numbers

shown on the balance of Respondents' Exhibit 200-D, which is page 3 of the schedule attached to the subpoena of Superior Portland Cement, Inc., on the ground, first, that the bids which involved more than $10,000 were all prior to the Code and upon the further ground that a score of them were bids involving approximately 200 barrels or at least less than the amount of $10,000 and I think the first one which involves $10,000 and which also was after the Code is A-33539-A.

21574 Q. That is the invitation, is it, for the Yakima-Roza project, 16,000 barrels, invitation June 24, 1936, and opening date July 2, 1936?

A. Yes.

21575 Q. This consists, does it, Mr. Taylor, of the invitation to bid and the abstract of bid and the certificate of award on this project?

A. Yes.

21576 Q. Mr. Taylor, this is one that you had in mind when making your general statement, is it not? It was in 1936.

A. Yes.

(RESP. EX. 340-A to 340-H, both inclusive, were offered and received in evidence.)

21577 The witness identified Resp. Ex. 344 A-L as a copy of the contract with the Pacific Portland Cement Company for cement for the Yakima-Roza project in Washington and also an abstract of the bids and related papers. Bids were invited March 4, 1937, and opened March 18, 1937. There were two schedules, one calling for 85,000 barrels and the other for 22,000 barrels. The invitation calls for bids for delivery at shipping point and/or Pomona, Washington.

21580 (RESP. EX. 344-A to 344-I, both inclusive, was offered and received in evidence.)

21582 The witness identified Resp. Ex. 345 A-J, inclusive, (21583-21584) as the copy of the contract with the Superior Portland Cement, Inc.; copy of the Superior Portland Cement contract for furnishing 9600 barrels of cement for the Yakima-Roza project in Washington; bids for which were invited June 23, 1937; bids opened June 30, 1937. The invitation called for delivery at shipping point and/or 4800 barrels to Terrace Heights and 4800 barrels to Moxee City. There were no abstracts with this.

21584 Q. Does the contract show on what basis the bid was awarded?

A. F.o.b cars, Seattle, Washington.

Q. That is the location of the mill of the Superior Portland Cement Company, is it not, at Seattle?

A. I believe it is. I am not sure.

Q. In other words, that would be an f.o.b. mill bid?

A. Yes.

21585 (RESP. EX. 345-A to 345-J, inclusive, was offered and received in evidence.)

The witness identified Resp. Ex. 350 A-K as
21586 invitation No. A-33683-A, together with related papers and abstract of the bids, for 42,000 barrels of cement for the Yakima-Roza project in Washington, bids for which were invited November 17, 1937, and opened November 29, 1937.

21587 (RESP. EX. 350-A to 350-K, inclusive was offered and received in evidence.)

21590 By Mr. Little:

Q. Mr. Taylor, I have now explained—I have asked you concerning all of the Reclamation Bureau bids which we know of, and I will ask you whether you know of any invitation issued by the Reclamation Bureau since the Code; not since the effective date of the Code; I am asking after the Code period; if you know of any invitation for bids for cement used by the Reclamation Bureau in the State of Washington where any company in Western Washington declined to bid on an f.o.b. mill basis when requested? Do you know of any instance where any company in Western Washington declined to bid f.o.b. mill when requested?

A. I can't recollect any; no, sir.

21593 By Mr. Shefelman:

Q. Mr. Taylor, you say you know of no instance in which the Northwestern was involved?

A. I can't recollect any.

Q. You have none in mind, have you?

A. No.

21599 Mr. Little: That is all.

Now, I want, if Your Honor please, just to make this offer for the purpose of the record in view of Your Honor's statement. I wish to offer to show that in invitation No. 13294-SP-6-13, dated—invitation dated May 27, 1938, date of bid opening June 13, 1938, calling for under schedule 1, two million barrels of ce-
21600 ment, and under schedule No. 2, for 5,800,000 barrels of cement, were sent to companies in the Pacific

Northwest; the invitations including the companies in Western Washington.

I offer to prove by this witness, and I have asked him to produce the invitations, the award, the contract, and the abstract, that if he were permitted to testify, he would say that each of the companies to whom invitations were sent, including the companies in Western Washington, furnished an f.o.b. mill bid in compliance with the invitation.

I wish also to show by this witness—I offer to show—that the destination on this opening was not shown. They requested only f.o.b. mill bids without disclosing the destination or the place of the actual use. The abstract, however, will show that it was known to the Government that the cement was to be used in the construction of the Grand Coulee Dam.

I offer to show that each of them bid in spite of the fact that the destination wasn't shown, and that they could not tell what rates were available, and that this witness would testify that the Government didn't inform the bidders what rates were applicable, land grant or special, and that also the bids furnished pursuant to the invitation were all
21601 different, and that the laid-down cost to the Government of the cement called for, when adding the applicable special rates from the mills to the place of the actual use, were also non-identical.

I also offer to prove by this witness with reference to invitation No. 17138-SJ-4-26, invitation date, April 16, 1939; date of bid opening, April 26, 1939, calling for 200,000 barrels of cement, no destination was shown; no place of actual use, although it was known to the Government it was intended for use in the Grand Coulee Dam.

I offer to make the same proof with reference to this invitation, which I stated I offered to prove with reference to the preceding one, with the exception that no awards have yet been made so far as we know under the request for 200,000 barrels of cement. All of the bids were f.o.b. mill as requested; all of the bids were non-identical. They were different.

Furthermore, when applying the special rate, which was not disclosed to the bidders, and that the witness will admit that they were not disclosed to the bidders—when applying that special rate from all of the mills to the point of actual use, the destination laid-down cost to the Government under each bid was different from the others.

I make this further explanatory statement so that
21602 Counsel won't think that I have just selected these as representing just our theory of the case and segregating them from others, that to my knowledge these are the only large items involving more than $10,000, and, therefore, which this witness could testify concerning, other than those which I have already mentioned, or which the witness has testified concerning, and that I make this offer or proof to cover all bids since this witness was on the stand, and all invitations for bids by companies in Western Washington and to show that f.o.b. mill bids were given whenever requested, and that the cost to the Government of the cement under these bids have in every instance since the time I mentioned been different and competitive.

21603 Trial Examiner Norwood: Well, that is all subsequent to this witness' testimony.

Mr. Little: The ones I have now mentioned were subsequent to the witness' testimony on the stand, but because of any inference that might be drawn, and since a cease and desist order looks to the future and not to the past, I think I have the right to show that any inferences that might be drawn at the time any application for a cease and desist order might come up, would not apply to any company in western Washington. That is why I make the offer. A cease and desist order is slightly different from a proceeding seeking to find out what facts obtained two years ago, or when the witness was on the stand.

Trial Examiner Norwood: Very well.

Mr. Little: I think the rule should be broad enough to permit me to show that even if this witness said that in 1937, nevertheless no inferences should be drawn in this proceeding in view of the fact that no company in western Washington has declined to bid f.o.b. mill, and the bids have been, I must say, very highly competitive in the State of Washington, and this evidence would show it, and I think we are entitled to prove it.

Mr. Wooden: I always understood from Counsel
21604 for Respondents that the fact that bids were identical showed that they were competitive and not that they were different. Now Mr. Little makes the point that they are different shows that they are competitive.

Mr. Little: Well, Counsel—pardon me.

Mr. Wooden: But aside from that, I merely make the objection that it is obviously and palpably beyond the scope

of any direct examination of this witness, and improper here.

Mr. Little: I just want to answer—

Trial Examiner Norwood: I think that if Counsel—

Mr. Little: May I make this statement, if Your Honor please, in view of what Mr. Wooden has stated?

Trial Examiner Norwood: Yes.

Mr. Little: The invitations which I have offered to produce necessarily were invitations for bids to be secret bids to be opened by the Government, and while it can be claimed and is claimed with reason that identity of bids in the open market will obtain where there is competition, where the bids are invited and are secret written bids opened at a public opening, and they are all non-identical, it certainly rebuts any possible presumption that the bidders got together and that there was any collusion, and the purpose is to show that there couldn't have been
21605 any collusion on these most competitive bids in the Pacific northwest.

Mr. Wooden: We had a case in the record, Your Honor, that it was understood in advance that the bids would not be identical.

Mr. Withrow: Page and line?

Trial Examiner Norwood: Well, that may be. I think that the Counsel can show much of what he has offered there when he puts in his own case, but it cannot relate in any way to the testimony heretofore given by this witness, and is not proper on this cross-examination.

Now, the question of abandonment of a practice: If the practice should be found to exist. That is something that has been treated in the cases, and it is clear that abandonment of a practice in the absence of an assurance that it will not be resumed does not defeat a cease and desist order, but in view of the case, I shall reject the proffered testimony and the Counsel has his exception.

21606 *Redirect Examination by Mr. Wooden.*

Q. Mr. Taylor, referring to Commission's Exhibit 111-F, is that paper, or is that an abstract of the transaction that you had in mind when you answered Mr. Little's question about the Northwestern and Superior bids during the Code period?

A. That was the case I had in mind when I answered Mr. Shefelman's question.

Mr. Shefelman: Yes, he has already testified to that.
Mr. Wooden: He didn't refer to this number, though.
The Witness: Yes.
21607 Mr. Shefelman: That is during the Code period.
Mr. Wooden: Yes.

By Mr. Wooden:

Q. Now I show your Commission's Exhibit 142-C and ask you if that is a case—if that is an abstract of a bidding following the Code, the end of the Code period, in which the Northwestern and Superior Companies also bid on Grand Coulee?

A. Yes.

Q. August 28, 1935. Will you state whether or not Northwestern and Superior companies bid f.o.b. mill without any strings attached to that bidding in August, 1935?

A. What do you mean by "strings attached"?

Q. Well, whether there was a control clause used in that case; for instance.

Mr. Withrow: Your Honor, we object. The bids speak for themselves.

Trial Examiner Norwood: Sustained.

Mr. Wooden: All right.

By Mr. Wooden:

Q. Does the fact that any abstract made in your Department show that f.o.b. mill figure—has that any significance as to whether an f.o.b. mill bid was submitted or not?

Mr. Little: I object.

Mr. Shefelman: I object.

Mr. Clark: Objection.

21608 Mr. Little: I guess we all object to that, Your Honor.

Trial Examiner Norwood: Sustained.

Mr. Little: That is self-evident.

Mr. Wooden: I don't see any ground for laughter or objection or the sustaining of the objection.

Mr. Little: It is just a tidal wave.

Mr. Wooden: I know.

Mr. Withrow: Your Honor, if Mr. Wooden seriously takes that position I think that that should be added to my statement made this morning on the tabulations subject to check, if he has any question or that secre at all.

Mr. Wooden: It goes to whether the witness can testify about the meaning of a long course of practice in his department. If he can't do it—

Mr. Little: The Examiner has ruled.

Mr. Wooden: All right. I don't care much for that. I think it is absurd to think that that is absurd.

Trial Examiner Norwood: Well, I think that Counsel for the Commission appreciates that that is a matter for argument from the matter that is in the record there. That can be readily determined.

Mr. Wooden: I wasn't referring to this exhibit at all, Your Honor. I was asking a question based upon
21609 his long knowledge and experience in making abstracts and handling abstracts.

Trial Examiner Norwood: Well, he has told us that. He has told us all about that.

Mr. Wooden: I don't think he has, not on that question.

By Mr. Wooden:

Q. Referring again to Commission's Exhibit 112-D, are the bids that are shown in that abstract as f.o.b. mill or are they in your judgment derived from the delivered or destination price?

Mr. Shefelman: Just a minute, Mr. Taylor. I shall object. That is the very type of question we tried to ask and Counsel for the Commission objected, and Your Honor sustained the objection. Those exhibits speak for themselves. They may argue as they see fit about the matter.

Mr. Paulson: Your Honor, I think that—

Mr. Wooden: I didn't ask him any such question as that.

Mr. Paulson: I recall just before the Respondents closed their cross-examination, both by Mr. Little and Mr. Shefelman, it was to the effect that, did they bid f.o.b. mill? And they did that all through their cross-examination, but
21610 it isn't five minutes ago since they asked him if they bid f.o.b. mill.

Mr. Wooden: Yes. Your Honor overruled my objection.

Mr. Paulson: Mr. Wooden seeks to ask the same question, and they interpose the objection.

Mr. Shefelman: I asked no such question, Mr. Paulson.

Trial Examiner Norwood: Off the record. Off the record.

(There was a discussion off the record.)

21611 Trial Examiner Norwood: On the record. Go ahead.

By Mr. Wooden:

Q. Mr. Taylor, will you state whether or not Commission's Exhibit 112-D was any case that you had in mind in making answers to the questions that you did, as to Northwestern and Superior declining to bid f.o.b. mill?

A. I did not have in mind this particular case, but I said there may have been other instances where it did not apply.

By Mr. Wooden:

Q. Is this particular case, in 112-D, such a case?

Mr. Clark: I object to that question, on the ground that—

Mr. Little: It shows it was an f.o.b. mill bid.

Mr. Withrow: I would like to add to the objection heretofore stated that Mr. Wooden is trying to get this witness to change the face of the tabulation. The tabulation has a line for bid prices f.o.b. destination which has absolutely no figures after it, so that the person who prepared the abstract, the purchasing agent says, "I hereby certify that the above abstract of bid is correct"; and, further, 21612 in an administrative way, that there were no bids on an f.o.b. destination basis, and the line opposite f.o.b. mill has a figure under the name of each of the companies who bid, having made a finding that those were f.o.b. mill bids. I don't know what this witness can say about it.

Trial Examiner Norwood: I shall sustain the objections to the question as it stands.

I want to ask this witness to tell us fully what he understands an f.o.b. mill bid to be; that is, what he meant to imply in his previous testimony when he used the terms "f.o.b. mill bid."

Mr. Clark: In deference to Your Honor, may I have an objection to the question on the ground it calls for an opinion and conclusion of this witness, who is not qualified, and usurps the function of the Court.

Trial Examiner Norwood: It is what he intended to testify to; I am asking him what he meant.

Mr. Clark: I misunderstood Your Honor's question.

Trial Examiner Norwood: By those terms, in his previous testimony.

The Witness: By an f.o.b. mill bid?

Trial Examiner Norwood: Yes; explain fully.

The Witness: If the invitation calls for bids f.o.b. ship-

point, and in the schedule opposite the statement "f.o.b. cars at shipping point," with the shipping
21613 point stated, we call that an f.o.b. mill bid.

By Mr. Wooden:

Q. Now, Mr. Taylor, if you had a destination price, also, and the so-called f.o.b. mill price were merely the difference between the freight to the destination and the destination price, how would you classify that?

Mr. Little: I object to that on the ground we didn't go into that on our delayed cross-examination at all. It assumes things that are not in the record on the delayed cross-examination; not on a single one of the cases.

Trial Examiner Norwood: Basing these questions on the right of the witness to clarify this previous testimony, and he can tell us what he means by mill bids and what he meant when he testified to it.

Mr. Little: He told us what he means by mill bids, and he said—

Trial Examiner Norwood: And Counsel's question is directed to that, and I will ask the witness to answer the question from that standpoint, and explain the term that you used heretofore.

Mr. Little: He should not assume any facts which were not brought out on our delayed cross-examination, be-
21614 cause this involves the companies in Western Washington that we are discussing.

The Witness: What was your question, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. If we had a bid f.o.b. destination we would classify it as the destination bid.

By Mr. Wooden:

Q. You didn't get my question. Suppose you had, also—

A. At both?

Q. —both destination and f.o.b. mill, and the mill figure were merely the difference between the freight, how would you classify that?

A. It wouldn't make any difference to us.

Q. Haven't you had many such cases?

A. Yes, I believe we have had cases where they bid both ways. We asked for bids f.o.b. mill and—

Q. And with the difference merely the freight between the two—

Mr. Withrow: Your Honor, we object to that. He is trying to get into the record, now, some general testimony, and if he wants to prove the existence of such bids the best way is to use such bids themselves. What he means by f.o.b. mill bids is all right, but to go on and try to get the contents of certain bids in this way is improper
21615 and has led to a great deal of trouble.

Trial Examiner Norwood: The objection is sustained.

By Mr. Wooden:

Q. In your abstracts, do you use an f.o.b. mill figure at times which is just the destination price less freight?

Mr. Little: What abstracts, if the Court please?

Mr. Wooden: Any abstracts.

Mr. Withrow: We want to object to this question because it was previously asked by Mr. Wooden and the objection sustained.

Trial Examiner Norwood: Objection sustained.

Mr. Wooden: Your Honor, the witness brings in abstracts here. There have been abstracts put in evidence on this deferred cross-examination and now I am not permitted to ask the witness practice as to whether they make out abstracts that show f.c.b. mill figures that are derived by deducting the freight from the delivered price. I just can't get it.

Mr. Little: We gave Mr. Wooden a list of all the abstracts we wanted brought in, and the bids themselves. We have taken his own witness, Mr. Taylor, and the abstracts prepared in his own office. We would rather have had the bids, but now Counsel is trying to impeach his own witness and the exhibits he has brought.

Mr. Wooden: I am merely trying to get at the truth.

21616 Mr. Little: So are we. We have accepted the good faith of the Government, and in submitting these abstracts they show f.o.b. price submitted by these Respondents and I don't think Counsel should try to impeach those abstracts without cross-examining him with reference to the bids which he hasn't produced.

Trial Examiner Norwood: The Counsel may bring out this witness' understanding of the term as he has used it, and I think that is as far as he can go on this redirect examination unless he has some other testimony which will enlarge upon the abstracts you put in, or something like that.

By Mr. Wooden:

Q. Mr. Taylor, prior to the time of your appearance on direct examination, had the Reclamation Service, so far as you know, called for f.o.b. mill bids without naming the destination?

A. Subsequent to the Code?

Q. Yes.

A. I don't recall any instance, although there may have been. The usual practice was both ways, shipping point and/or destination.

Q. And with regard to large orders, large quantities, without destination specified, state whether or not the destination was usually known to the trade even though
21617 you don't specify destination?

Mr. Clark: That is objected to on the ground it clearly calls for the state of mind of somebody who is not even in the courtroom. I object to it as incompetent.

Trial Examiner Norwood: Sustained.

Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wooden:

Q. Mr. Taylor, showing you Respondents' Exhibit 290-A to H, inclusive, was that f.o.b. mill figure given in that bid a genuine f.o.b. mill figure, or was it derived and figured back from a delivered price?

Mr. Shefelman: I object, if the Court please, that is again asking the witness to construe a particular instrument. It speaks for itself, and he has explained what he considers to be an f.o.b. mill bid.

Mr. Clark: It calls for a conclusion of the witness, "a genuine f.o.b. mill bid."

Mr. Withrow: It also asks of the witness how the bids were made up by a person who is not in the courtroom.

Trial Examiner Norwood: Read the question.

(Question read.)

21618 Trial Examiner Norwood: Objection sustained.

Mr. Wooden: Your Honor, they were permitted to ask whether that was a—if the company bid f.o.b. mill. I am not permitted to ask whether it was a true f.o.b. mill figure or not.

Mr. Little: It just involves the construction—

Trial Examiner Norwood: I am not sure he was asked

that. If he were asked that he may explain his previous testimony.

Mr. MacIntyre: On each one of these he was permitted to answer the question over an objection.

Trial Examiner Norwood: Please base your question on this previous testimony and let us let it appear there—you have the record there. I am going to let him explain that; I think he is right.

Mr. Clark: May I, inasmuch as this is an exhibit I introduced, explain something shown on the face of this exhibit?

Trial Examiner Norwood: Yes.

Mr. Clark: This is an abstract attached to this exhibit, and it is 290-H in evidence, and in the third column a California Portland Cement Company bid in abstract form, that shows as follows—it shows how far afield we are getting here: Unit price; destination; nothing shown on the abstract under any bids; invoice price, f.o.b. mill; every one of them shown. There isn't anything to explain there, not a thing to explain, and I submit the question is objectionable on the ground it is an attempt to impeach the document—

Trial Examiner Norwood: He may explain what he meant by that previous testimony.

Mr. Wooden: All that means if you put a certain label on a proposition you can't go behind that label; that label is all there is to it.

Trial Examiner Norwood: Ask him to explain what he meant by that previous testimony, and tell us what that previous testimony was.

Go ahead.

By Mr. Wooden:

Q. Mr. Taylor, as I understand you on deferred re-cross examination, you testified with regard to Respondents' Exhibit 290-A to H that the Union Portland Cement Company bid f.o.b. mill—

Mr. Withrow: We object on the ground this witness was asked whether or not the tabulation showed f.o.b. mill bids. This witness did not make the tabulation.

Trial Examiner Norwood: But you asked him to look at the tabulation and say whether it was an f.o.b. mill bid.

The objection is overruled.

21620 Do you want the question read?

The Witness: Yes.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. Wooden: I didn't finish the question.

Trial Examiner Norwood: Finish the question.

By Mr. Wooden:

Q. I now ask you whether, in that case, that f.o.b. mill figure was derived from a delivered price figure.

Mr. Clark: May I have an objection, please? I object on the ground the question assumes something not in evidence, and on the further ground it misstates the evidence in the record. The witness was not asked a word about the Union Central Company; not a word.

Mr. Paulson: This is certainly confusing.

Trial Examiner Norwood: I think that is getting extremely technical.

Mr. Paulson: I think that Counsel for Respondents are in a very peculiar position right now. They maintained that they had the right to cross-examine this witness to the extent that they could put in new material, and they did. They were allowed to do that. Now, when we seek to qualify that and discuss and ask a question about that new material, they object.

Trial Examiner Norwood: Yes.

21621 Mr. Paulson: It is bringing out the facts, and, certainly, we are entitled to ask questions to test the facts that they have brought out by this witness on cross.

Trial Examiner Norwood: You may do so. You may do so.

Now, read that question. Let's have the question read.

Do you want to restate that question? I want him to give his answer, and what he meant by that, and you may bring that out, but if you ask him what is in that paper, why, that will be objectionable.

By Mr. Wooden:

Q. Do you have the question in mind?

Mr. Shefelman: If the Court please, that is the very thing I objected to, when he asked him that question. He asked him about the specific thing, and that is what I am objecting to.

Trial Examiner Norwood: The question was unfortunately worded, I think.

Mr. Shefelman: Yes.

Trial Examiner Norwood: Go ahead and read the question.

(Question read as follows:

"Q. I now ask you whether, in that case, that f.o.b. 21622 mill figure was derived from a delivered price figure.")

Mr. Shefelman: That is the very exhibit he is asking him about. He is asking him to interpret the instrument, not to give his general opinion of these things, and we object to that question for that reason. How could he testify as to what is in the mind of the bidder?

Mr. Paulson: That objection comes down to this, that we should have asked it on voir dire instead of on redirect. In other words, that we should have put those questions so as to be able to object to the instrument. We are contending now that the instrument doesn't show what Counsel for Respondents contend that it shows. Now, of course, we could have done it on voir dire. We tried to, but we weren't successful.

Trial Examiner Norwood: Doesn't the instrument, itself, evidence that?

Mr. Paulson: No, it doesn't evidence that this was f.o.b. mill bidding. The evidence is to the contrary, and Mr. Wooden is seeking to show that it evidences to the contrary.

Trial Examiner Norwood: Well, I am going to overrule the objection and let him explain this fully.

Mr. Clark: Well, Your Honor, may I make this statement?

Trial Examiner Norwood: Yes.

Mr. Clark: If Mr. Paulson is correct, all of this discussion and argument and questioning of the witness is utterly useless, because the instrument shows not an f.o.b. mill bid but something else. The instrument shows it, itself.

Trial Examiner Norwood: I want this witness to explain his previous testimony to the effect that that instrument showed an f.o.b. mill bid. He may ask him what he means by f.o.b. mill, and what he understood this paper to mean when he testified in that way. Now, you can go ahead and bring that out.

Mr. Withrow: That isn't the question.

Mr. Wooden: That is what I want to find out, whether the witness when he said that this—

Mr. Shefelman: Pardon me just a minute. I am going

to object to Counsel making any statement that is for the purpose of advising the witness. There is a question before this witness.

Trial Examiner Norwood: He is asking the witness a question.

Mr. Wooden: The witness clearly understands, I think, what I want.

Trial Examiner Norwood: Questions are supposed to advise the witness on certain points, you know, as to what he is expected to testify to.

21624 Mr. Shefelman: Not to give him the answer.

A. My answer in regard to this invitation is that the bid made by the Union Portland Cement Company was f.o.b. mill, and that is based on the fact that this copy of the contract with the Union Portland Cement Company shows a price of 1.1544 per barrel f.o.b. Devil Slide, Utah, which is their shipping point.

By Mr. Wooden:

Q. My question is whether or not you could tell whether that was a figure that was derived from a destination figure.

Mr. Withrow: Your Honor, that is an improper question, and we object to it. He is not being asked whether in his opinion that bid is an f.o.b. mill bid.

21625 Trial Examiner Norwood: The objection is overruled.

Mr. Clark: I wish to call Your Honor's attention to the fact that nothing about the Union Portland was mentioned on cross-examination.

Mr. Wooden: You put it in evidence. You put it in evidence.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: There is your exhibit.

Trial Examiner Norwood: Answer the question.

A. I cannot tell how the bid was derived. The only information that I have before me is that the abstract shows that same 1.1544 as the invoice price f.o.b. mill.

By Mr. Wooden:

Q. You don't know whether there was a control clause in that connection or not?

A. You mean the Government control clause?

Q. No. I mean the control clause used by the industry with regard to a deduction of commercial and land grant or special railroad rates, whichever was lower.

A. I don't see anything here in these papers.

Q. Do you mean the papers represented there are not sufficient to enable you to answer the question?

A. The bid of the Union Portland Cement Company is not here.

Q. What is that 290-A?

21626 A. This is simply a copy of the contract.

Q. Oh. Even the original bid is not here?

A. No.

Q. You couldn't produce that?

A. I couldn't.

Trial Examiner Norwood: Can you tell from the data on that whether that is a bona fide mill bid or a derived mill bid or what?

The Witness: I can't tell except, as I stated before, that the contract shows an f.o.b. mill bid, while the abstract shows the same statement as the invoice price, f.o.b. mill.

Trial Examiner Norwood: Yes. Well, is that invoice price f.o.b. mill? Do you call that a mill bid, an f.o.b. mill bid proper?

The Witness: Not necessarily. Not unless it is so stated on the abstract that it is an f.o.b. mill bid.

By Mr. Wooden:

Q. And does the fact that the f.o.b. mill figure is in four decimal places mean anything to you as to whether it is a derived figure or not?

Mr. Withrow: I object, Your Honor, on the ground that what that means to this witness, whether four decimal or a dozen decimal places—that is not important in this case, his opinion, and has nothing to do with

21627 cement at all.

Trial Examiner Norwood: The objection is overruled. We are trying to find out what he means by those terms. Go ahead.

A. My answer is that it would appear to be a derived figure where decimal places are used.

By Mr. Wooden:

Q. Now, referring to Respondents' Exhibit 340-A to H, I will ask you whether or not you can tell from those papers—

Mr. Shefelman: Which project does that cover, Mr. Wooden?

Mr. Wooden: Yakima Dam.

Mr. Little: Yakima-Pomona, Washington.

By Mr. Wooden:

Q. My question is whether you can tell from those papers whether the f.o.b. mill figure of 2.817 was a figure derived from a destination price or not.

Mr. Little: I make the same objection, if Your Honor please. When this was offered in evidence, and it was offered by me, I offered it to show that there was a destination price bid, but the bids contained the provision which the abstract evidences that the Government could deduct the commercial freight rate, and, necessarily, by deducting, it would arrive at what maybe Counsel wishes to call
21628 a derived bid. It is a commercial rate subtracted from a destination price which gives the Government the benefit of the land grant rate.

Trial Examiner Norwood: We are trying to find out whether this witness meant one of those bids or some other kind of a mill bid when he used the term "mill bid" in his previous testimony.

Mr. Shefelman: May I ask just one question on that?

Trial Examiner Norwood: Yes.

Mr. Shefelman: The Northwestern Portland is not a party to that on the abstract, is it?

The Witness: No.

Mr. Shefelman: So that we are not interested.

Mr. Withrow: Your Honor, with reference to this exhibit, however, this witness was not asked a question about whether or not it showed f.o.b. mill bid, because on Mr. MacIntyre's objection, the objection was sustained, and Mr. Little was not allowed to ask the question, and it is therefore plain that this is improper redirect examination.

21629 Mr. Paulson: That is the only reason it could have been received, that it showed an f.o.b. mill bid. That was the purpose of the offer. It is the whole essence of it.

Trial Examiner Norwood: I shall overrule that objection.

Do you understand the question?

The Witness: Yes.

A. My answer to that is, that this was an f.o.b. mill bid, was based on this copy of the contract with the Superior Portland Cement Company, which states: "F.o.b. cars, Pomona, Wash." This particular—I will take that back. I didn't—I will have to correct that. I don't—I was not asked the question, if this was an f.o.b. mill bid.

Mr. Little: No, I just offered it in evidence, Your Honor.

The Witness: This is a destination bid.

21632 Washington, D. C.,
June 14, 1939.

21639 PERCY I. TAYLOR thereupon resumed the stand and testified further as follows:

Redirect Examination (Continued) by Mr. Wooden.

Q. Mr. Taylor, referring to Respodents' Exhibits 264, 273, 290, 292, 295, 296, 297, 302, 344, and 345, can you tell us which of any of the abstracts of bids that form a part of those exhibits were prepared by yourself (handing documents to the witness)?

A. None of the abstracts were prepared by me. They are prepared in the Denver office and sent in to Washington.

Q. Mr. Taylor, when abstracts of bids on cement are made up in your office on bids that were exclusively on a destination basis, did you work out, in the abstracts of such bids, the f.o.b. mill equivalent of those destination bids?

Mr. Clark: That is objected to as immaterial, if the Court please.

21640 Mr. Withrow: And on the further grounds that the testimony of the witness is that it is not done in his office.

Trial Examiner Norwood: The objection is overruled. We have left this subject, here, in a little state of confusion, and I think it should be straightened out.

Answer the question.

A. In making up the abstract of bids, it is the custom of the Bureau where destination bids are received, and we can get a lower net delivered cost on that destination bid by using special land grant rates, we figure a mill price and ship on Government bill of lading.

By Mr. Wooden:

Q. I am asking you what the practice is with regard to the preparation of your abstracts. In the case of destination bids, do you figure out in your abstracts the f.o.b. mill equivalent?

Mr. Withrow: Your Honor, it should appear that this witness had prepared some abstracts, first. You are ask-

ing him to speculate, you are not asking him about his knowledge about this. He says it is not done in his office.

Trial Examiner Norwood: Doesn't he examine these abstracts and decide which is the lowest bidder?

Mr. Withrow: But he didn't make them up,

21641 and Mr. Wooden is asking him the manner in which they are made up in Denver.

Mr. Wooden: I am not asking about these particular papers of yours, now—

Trial Examiner Norwood: The manner in which he checks them up?

Mr. Wooden: Yes.

Trial Examiner Norwood: The objection is overruled.

Mr. Withrow: That is not the question.

Mr. Wooden: It is the question.

Trial Examiner Norwood: Read the question.

(Question read.)

A. Yes, we figure an invoice price f.o.b. mill.

By Mr. Wooden:

Q. And how is that figure expressed on the abstract?

A. I don't just understand your question. It is given as an invoice price f.o.b. mill.

Mr. Withrow: Can we have the same objection to this entire line of testimony, and we have the added objection that this testimony in this form is not the best evidence; the abstracts of bids and the bids would be the best evidence of what the practice of the Bureau has been.

Trial Examiner Norwood: Counsel may have his exception on this line of questions.

21642 By Mr. Wooden:

Q. When you make an award, Mr. Taylor, after making out such an abstract, what is the contract price that goes into the contract?

A. The contract price is the invoice price f.o.b. mill.

Q. Derived by this method that you just spoke of?

A. Yes.

Q. Now, Mr. Taylor, look at Respondents' Exhibits 264, 273, 290, 292, 295, 296, 297, 302, 340, 344, 345, and 350, and tell us whether the original bids are among any of those papers, or whether you merely have a copy of the contract price.

21643 A. All we have is a copy of the contract and an abstract of the bids.

Q. You haven't finished examining them yet, have you?

A. The papers here are copies of contracts, and in most cases an abstract of the bids.

Q. Are any of the original bids or copy of bids, themselves, among those papers?

A. No.

Q. Can you tell from any of those papers whether or not in the bidding the so-called control clause was used in the bids, meaning by the "control clause" one providing that the Government might deduct the land grant, commercial, or special rate, whicheyer was lowest.

A. I don't see that control clause in any of these papers.

Q. Can you tell from any of those papers whether there was such a control clause in the bids as received?

A. No.

Q. Now, Mr. Taylor, I wish you would clarify your testimony that you gave on deferred cross some two weeks ago with respect to whether the 15 instances or bids that were identified by you and offered in evidence while you were on the stand on direct—as to their representative character. Some questions were asked about it. I think even the Examiner asked you a question about it, and just for the purpose of enabling you to clarify the
21644 situation, what did you mean by your statement as I recall it, that the bids and abstracts offered in evidence were not necessarily representative of the bids but were representative of the bidding? Do I correctly state the purport of your testimony?

A. That is about correct; that all cases are similar. They vary only in the amounts of the bids and sometimes in conditions of the bids, but I don't know the word that I used, probably "representative bids" or "typical bids."

21645 Q. State whether or not, even your last answer—you mean by your last answer that from time to time the prices bid—

Q. —the prices bid differed on the different lettings, but that the cases that you identified were typical and representative, or that the prices themselves were not typical? Just what did you mean? I just want you to clarify it.

21647 By Mr. Wooden:

Q. I will just ask the witness to state as com-
21648 prehensively and as completely and as fully as he can the basis for any testimony that he gave as to

the representative character of the 15 cases that were put in evidence.

A. The fifteen cases were, as I stated before, representative cases of the Bureau of Reclamation procedure in inviting bids and taking bids, and are similar to many other cases that we have, with, of course, variation in bid prices and conditions of bidding.

By Mr. Wooden:

Q. You mean the variation as between bids invited at different times, or as between bids invited and submitted on the same letting?

A. I mean bids at different times, different projects, different conditions.

Recross-Examination by Mr. Clark.

Q. I understood you, Mr. Taylor, to say in your redirect examination in response to a question from
21649 Mr. Wooden that among the documents handed you, and he enumerated their numbers in evidence, one of them was 350—was it not? You had the entire bundle in your hands when you answered. I understood you to say that there was no bid or copy of bid among them. Please examine 350 and state whether or not you wish to change that testimony.

A. No, this is a copy of a contract, not the bid.

Q. The document which I hold in my hand, being No. 350-A, the first page of Exhibit 350, is entitled "Invitation, Bid and Acceptance"?

A. Yes.

Q. And the bid is not there?

A. No, a copy of the bid is there but not the bid.

Q. Well, I said a copy of the bid in my question, didn't I?

21650 A. The copy of the bid is here. The original is not. The—

A. But this is not the true copy of the original bid, which is not here.

By Mr. Clark:

Q. Wherein does it differ, Mr. Taylor, from the original? You say it is not a true copy.

21651 A. There are various instructions inserted on this copy of the contract which, of course, do not

appear on the original bid and in making up this copy of a contract the Denver office would not follow the original bid in every particular. It would not be necessary for the purpose of the contract.

By Mr. Clark:

Q. I show you now Respondents' Exhibit No. 345 in evidence and ask you to state whether or not what purports to be a copy of the bid is there (handing document to the witness)?

A. This is a copy of a contract.

Q. I call your attention to the first page of Respondents' Exhibit 345, being A of that exhibit number, entitled "Invitation, Bid, and Acceptance."

A. Yes.

21652 Q. You say there is no copy of the bid or what purports to be a copy of the bid in this document?

Trial Examiner Norwood: Is that right?

By Mr. Clark:

Q. Is that correct?

A. It is not an exact copy of the bid, and I cannot say that all the information contained on the original bid is contained in this document, but necessary information taken from the bid is in this document.

Mr. Wooden: Necessary for what purpose?

The Witness: For the purpose of the contract.

By Mr. Clark:

Q. I now hand you Respondents' Exhibit 296-A to N, inclusive. Please examine that exhibit and state whether or not what purports to be a copy of the bid is in that (handing document to the witness)?

A. I cannot say. I have never seen the original bid. I haven't the original bid here.

Q. Would your answer be the same with respect to each one of the remaining numbers, the same as the last answer, or do you wish to look at them and say?

A. No, I understand these are copies of contracts which contain information taken from the bids. They use the form, the general standard Government form, invitation, bid, and acceptance for the purpose, and that same

21653 form is used when the bids are submitted, and it is used for a contract for acceptance of that bid, but I want to make it plain that I am not sure that it contains

all the information contained on the original bids, which are not here.

Q. Where are the copies prepared, these documents that are on the table?

A. These are prepared in the Denver office.

Q. They are the only things you have in your office; is that right?

A. Yes, just one file copy of the contract as executed.

Q. What is the practice, as far as you know, with respect to indicating or not indicating on the abstract the presence of the control clause, if one is used in a bid?

A. Which control clause do you refer to?

Q. Any control clause.

A. There are two, as we understand; the cement company's control clause and the Government's control clause.

Q. Well, the Government's control clause.

A. That appears in the mimeographed sheets attached to our invitation for bids as they are sent out.

Q. Is the presence of the control clause indicated in the abstract in any way?

A. In the abstract?

Q. Yes; the abstract of the bids.

A. No, the abstract is simply the bids—

21654. Q. If you will pardon me; I know what the abstract is. I am just asking you if the presence of the control clause is indicated in the abstract.

A. On the abstract.

Q. Yes, of the bid.

A. No, except that Government land grant rates show on the abstract, if we are using them; you understand.

I. D. ROYAL was thereupon recalled as a witness for the Commission and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark.

21657 Q. Mr. Royal, on your direct examination, you testified, in substance, according to the transcript, about an interview you had with Mr. Merrill, I think it was, of the Southwestern Portland Cement Company, at Los Angeles: C. C. Merrill? And your testimony, in substance, related to the make-up—that is, your conversation with Mr.

Merrill related to substance, in part, pursuant to the [illegible] make-up of prices of Southwestern Portland Cement in California. Do you recall the substance of that?

A. I see all those were statements along those lines, yes, sir.

Q. Now, other than what you testified to—I will hand you the memorandum of your interview, it being Commission's Exhibit, for identification, No. 2936-A to I, inclusive—was anything further said by Mr. Merrill about the make-up of prices by the Southwestern Portland Cement Company?

A. Anything further in addition to what is in this memorandum?

Q. Oh, no.

A. Report?

Q. You didn't testify to everything that is in the memorandum. I am not going to ask you about everything that is in the memorandum. I merely want to know about the prices.

Well, do you remember whether or not you mentioned in your direct examination—I am doing this to shorten the examination.

A. I see.

Q. —anything about a statement by Merrill with respect to the basing-point system in Southern California?

A. As I recall it now, offhand, there were statements to the effect that the basing points were not made use of in Southern California to the extent that they were in other parts of the United States.

21659 Q. At the time you took the interview with him—had the interview with him—you made a memorandum of his statements, did you, Mr. Royal?

A. Yes.

21660 Q. And you subsequently had those notes transcribed on the document that I hold in my hand here, being Commission's Exhibit 2936-A to I, inclusive, is that right?

A. I know nothing about the numbers. That is the document here.

Q. This document that I handed you here a moment ago?

A. That is right.

Q. I am going to ask you if you will read the last paragraph on the page that is open before you.

Mr. Wheeler: He doesn't mean to read it aloud.

Mr. Clark: To himself, yes.

Q. Very well. Let me have it, please.

You have read the paragraph that I indicated to you a moment ago, have you, Mr. Royal?

A. I have read it hurriedly.

Q. Well, now, if you will be good enough to answer this question for me: At the time you had your interview with Mr. Merrill, that interview occurred in Los Angeles, did it not?

A. Yes, sir.

Q. And it was on or about January 27, 1932. That is a long time ago, it is quite true.

A. Yes.

Q. Didn't Mr. Merrill tell you at that time, and didn't he insist that no basing points were in use in Southern California?

21662 A. Mr. Merrill said they did not use basing points in Southern California.

By Mr. Clark:

Q. Then you were in error—I don't say intentionally in error, of course—this conversation occurred a long time ago—you were in error in the answer you gave a while ago when you qualified that by saying he said they didn't

21663 use basing points to the extent that they did elsewhere?

A. I was speaking of the testimony in general from various operators in Southern California at that time.

Q. I see. Now, I am asking you about the statement made by Mr. Merrill.

A. Mr. Merrill.

Q. And that is the only one I am asking you about at the moment. And it is a fact Mr. Merrill stated to you that no basing points were in use in Southern California?

A. That was his statement; yes, sir.

21668 Q. On your direct examination, Mr. Royal, I have you down as having testified, and I am merely stating the general nature of the testimony with respect to these particular matters, at pages 12844 to 51 of the transcript, and I am merely stating the substance, now, concerning the Riverside publishing price lists and the zone pricing and the fact that other companies followed the Riverside prices, all of which was stated to you by Mr. Gaines Beckett. Do you recall giving in substance that testimony?

A. I can't say that I recall giving the testimony. I do recall something of that kind in the way of information obtained from Mr. Beckett.

Q. Well, if you will take it from me that you did give, in substance, testimony about those matters. Now, I merely want to see if you can supplement that a little bit, that is all. You did not say anything in your direct examination—at least, my notes indicate that you did not—about the extent of the zone system as stated to you by Mr.
21669 Beckett, but you did state a good deal about the zone pricing as stated to you by Mr. Beckett.

Do you recall whether he said anything to you about the extent of the zone system?

A. I can't recall that, offhand.

Q. Well, will you examine—you made a memorandum of your conversation with Mr. Beckett?

A. I did, yes.

Q. I am handing you, Mr. Royal, Commission's Exhibit, for identification, 2939, and I am handing you the exhibit at page F. Will you just look at the first part of that last paragraph on that page, the first half of the sentence? Just the first sentence, is all, unless there is something qualifying it subsequently.

Do you recall that Mr. Beckett told you that the territory marked off in zones on the zone map is all within what is considered the Los Angeles Metropolitan District?

A. That is practically what he said, yes.

Q. Well, that is what your memorandum shows he said, isn't it, Mr. Royal?

A. That is what the memorandum shows what he said substantially.

Q. And your memorandum is correct as far as you could make it?

A. It should be understood that there might be
21670 other paragraphs further on in the report that would relate to the same thing.

Q. That is right.

Well, I will tell you if there are. I haven't found them, but that doesn't mean that they are not there. I looked it through with special reference to that.

So you now recall, do you, that Mr. Beckett did tell you at the time of your interview with him, which was, according to this memorandum, February 5, 1932, in Los Angeles or thereabouts?

A. That undoubtedly was the date. That was the place.

Q. That the territory marked off in zones on the map is all within what is considered the Los Angeles Metropolitan District?

A. Metropolitan area of Los Angeles.

Q. Yes.

21678 *Cross Examination by Mr. Clark.*

Q. In response to a question put by Mr. Wooden, you said that Mr. Beckett told your that the Riverside Company put out price lists most frequently of any company, or you made some statement in substance like that. He also 21679 denied, did he not, that it was understood by the various companies that Riverside would periodically publish price lists? Do you want to see this (indicating)? That is what I am asking you about.

A. He denied that there was any understanding that the Riverside Company would publish the price lists periodically.

Q. I refer to Merrill, not to—

A. Merrill, yes.

Q. This is Merrill we are talking about.

A. That is Merrill of the Southwestern.

Q. And he said that he personally does not know whether his company receives copies of price lists as put out by the Riverside?

A. He so stated; yes, sir.

21701. MAJOR HERMAN FELDMAN was thereupon recalled as a witness for the Commission and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Clark.

21715. Q. Please examine a set of instruments marked Respondents' Exhibit 359-A to 359-C, for identification, and state whether or not that constitutes an example of the Government disregarding a control clause although the control clause made the cost to the Government less than the bid that was accepted.

21716. A. We disregarded the bid because of the control clause without regard as to whether or not the

price may have been lower, may or may not have been lower than the one accepted.

21720 Trial Examiner Norwood: Well, this witness has brought these papers here pursuant to your request. You have them. They are marked for identification, and he has identified them for you. Now, I think he is through with them.

Mr. Clark: Is that Your Honor's ruling?

Trial Examiner Norwood: Yes, sir.

Mr. Clark: Well, I make the offer to show, if the Court please, why the documents which are in the witness' hands, being marked 359-A and following, for iden-
21721 tification in the instance of invitation of bids in response to invitation No. QM-ECW-5408-37-125; that is the Quartermaster's Corps there disregarded a control clause which would have enabled the Government to buy its cement at from 11 to 12 cents a barrel cheaper than it paid for the cement. I make that offer.

21723 By Mr. Clark:

Q. Didn't the Government issue invitations to bid containing this form: "Destination cost to the U. S. Government at Fort Riley, Kansas, it being understood that the U. S. Government shall determine the f.o.b. cars at manufacturer's plant for invoicing purposes on shipments moving on U. S. Government bills of lading to the
21724 above-named destination only by subtracting from the destination cost to the U. S. Government the land-grant rate as determined by U. S. Government as being applicable from manufacturer's plant to said destination. If land-grant rates are not applicable, then the U. S. Government shall deduct from the above-mentioned destination cost the actual commercial freight rate from manufacturer's plant to destination named."

Do you remember such a condition as that?

A. In one of our Government contracts?

Q. Yes.

A. None. No, sir.

Q. You don't remember any such thing?

A. No, sir; definitely not.

Q. When did you send your wire to Fort Riley for invitations? Approximately, Major.

A. Well, the very afternoon that I was excused here.

Q. Well, that is close enough.

Mr. Clark: Now, I want to call Your Honor's attention to this: I haven't seen these documents, but I am informed

that 15 documents which Major Feldman could not get, at least, which haven't been sent to him in response to the wire that he sent to Fort Riley the afternoon that he was last on the stand here before today—that is correct?

The Witness: Right.

Mr. Clark: Would show that the invitations con-
21725 tained the clause which I have just read, and from that I would wish to show that it was the presence of that invitation—that clause in the invitation—at least, in those instances—that prevented the Government from getting the kind of a bid that Major Feldman testified the Government wanted. Now, I am not questioning Major Feldman's statements on the stand at all, just trying to show the reason. So it is essential for us to be given access to those documents in order to complete the cross-examination of this witness. It is the old story, if the Court please. This case was tried by the plaintiff upon the theory that all he had to do was to put a witness on the stand to make a general statement based in part upon his own knowledge and in part on documents which were not available to him at the time and have not since been made available to us, and I contend that such testimony is incompetent.

Trial Examiner Norwood: Yes. Well—

Mr. Clark: Unless we are given access to the documents.

Trial Examiner Norwood: Now, I feel sure that the Respondents will have access to the documents. The fact remains that on account of the lateness of the notice that they can't possibly be obtained for them within the time in which it was agreed to terminate this extra cross-examination.

21726 Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: And Counsel may have those and offer them when he puts in his case, which is at the proper time to offer them, anyway.

Mr. Clark: If Your Honor please, the witness, of course, understands that he is not blamable anyway in this. This is just a lawyer's argument. When his name is mentioned it isn't because he has done anything that he shouldn't have. My position is very simple. Testimony of the kind that Major Feldman gave, based upon the lack of foundation that it now develops existed, is incompetent testimony, and it can only be made competent and, therefore, admissible to prove the facts that Counsel for the Commission attempted to prove by tendering those documents to Counsel for Respondents.

Mr. MacIntyre: If Your Honor please, we will assist—

Trial Examiner Norwood: The cross-examination may show any lack of foundation, and that is brought out by cross-examining this witness; that is the province of cross-examination. Now, to bring in other testimony to refute this testimony, that is the Counsel's duty when he makes out his own case.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: We have attempted to assist and
21727 cooperate with Counsel for Respondents to have all of these documents, and will continue to do so, and at their convenience at any time that we possibly can.

Trial Examiner Norwood: Yes. Go ahead.

21728 Mr. Clark: If Your Honor please, for the record, I now offer to prove that invitations, specifications 735-35-20, 735-35-38, 735-35-42, 735-36-19, 5707-36-112, 6139-36-4, 735-36-27, 735-36-39, 735-36-72, 735-36-76, 735-36-87, 735-36-92, 735-37-23, 735-37-41, 735-37-49, and each of them, all bearing date prior to January, 1938, would, if made available to us, show that each and every one of them contains the provisions which I read a moment ago to the witness, and which I don't care to take the time to read now.

Mr. Paulson: What are the dates of those, Mr. Clark? That is, what is the latest dates of any of those?

Mr. Clark: Well, there is one in 1937; February 23, 1937; that is the latest.

Trial Examiner Norwood: You offer to prove that by this witness?

Mr. Clark: I offer to prove it if we can get these documents. I can't prove it by the witness.

Mr. Paulson: Do you offer to prove that clause was used after the N. R. A.?

Trial Examiner Norwood: The Counsel may prove that.

Mr. Clark: I can't get the documents.

Mr. Paulson: I want to get the offer straight, if Your Honor please.

21729 Mr. Clark: It is clear.

Mr. Paulson: No, it is not. You didn't give us the dates.

Trial Examiner Norwood: You mean you can prove that if you have the documents?

Mr. Clark: Yes, sir; between March 14, 1935, and Feb-

ruary 25, 1937; those are the extreme limits as I see them, here, at a hasty glance.

Mr. Paulson: Is there more than one there since 1935?

Mr. Withrow: There are six or seven in 1936.

Mr. Paulson: I just wanted to get it clear.

Mr. Wooden: Every reasonable effort has been made, Your Honor, to provide the documents that he wishes to use, and without success, up to this time. It seems to me that every reasonable requirement has been met.

Mr. Clark: I want to get that clear, if Your Honor please.

It is my contention, if the Court please, that no attempt has been made. I am not complaining about Mr. Wooden, personally, I am talking law, now. No attempt has been made to comply with the rules of law which I have already explained to Your Honor that before the testimony given by Major Feldman it was incumbent, as a matter of fact, upon Counsel for the Commission to produce all the documents Major Feldman assumed to state the tenor of.

That was not done.

21730 Trial Examiner Norwood: That was stated as a ground of objection at the time the testimony was given, was it?

Mr. Clark: I have read the record on that, and I think it is perfectly clear. Time after time in the record, from the outset, Mr. Leisure has made the statement "We can't meet testimony of that kind; produce the documents."

21731 Mr. Paulson: I wanted to say evidently Mr. Clark didn't have clearly in mind what Major Feldman covered in his direct examination, because in that direct examination his testimony was confined to the bidding at Fort Leavenworth and instances typified by those biddings.

Major Feldman told us they had been receiving control clauses on their bids, and that they then sent out a circular to the cement industry, each of the bidders, and asked them, told them, advised them if they bid that control clause that the bid would be rejected. In other words that they considered the control clause bid an irregular bid. That would certainly clarify the bid, that that circular would make it perfectly clear as to the type of bid they wanted, and Major Feldman told us in response to those invitations they still got the control clause.

We illustrated it by two examples. That was the testimony of Major Feldman.

21732 Mr. Withrow: A little bit along the line Mr. Paulson has just taken; Major Feldman did testify as to the inability to get f.o.b. mill bids, and, also, as to circular 30; this clause Mr. Clark has read would seem directly contrary to circular 30, and if the invitations and bids were produced would limit the testimony of this witness, and would also limit and explain his testimony of f.o.b. mill bids.

Trial Examiner Norwood: And it is your duty to bring that up at the proper time and it doesn't belong here on the cross-examination.

Mr. Withrow: That is Your Honor's ruling, and Mr. Clark has taken exception to that.

With reference to Mr. Wooden's remark that all due efforts have been taken to produce the documents, I refer to page 21153 when the witness, two weeks after he had gotten his notice asking for these documents, was asked if he had made any attempt to secure the documents as yet and the answer was very clear, it was "No, sir."

Mr. Wooden: But it was not the result of any suggestion or advice on the part of Counsel for the Commission.

Mr. Withrow: I didn't mean to imply it was. I am merely stating the facts.

Trial Examiner Norwood: I don't think the rights of the parties are prejudiced in any way regarding
21733 these papers. They are available to you and you may have them when you put in your case.

As to prolonging this thing for papers it is impossible to get within the time, the time is already up.

Mr. Clark: I am not asking Your Honor to prolong it. I am asking Your Honor's ruling on it so that I may make the record.

Mr. Little: I had intended, in view of some of the statements of Major Feldman on cross-examination this afternoon, to cross-examine him with reference to that, particularly in view of his statement at transcript page 2312 with reference to the army circular, and I intended to ask him this question, but from what Your Honor has said you would probably rule it out, so I would like to put it in the form of an offer to prove.

I offer to prove by this witness that after this circular

had gone out—and I am speaking, now, with reference to the army circular—after it had gone out stating that bids containing the control clause would not be accepted, the contracting quartermaster in invitation No. W-488-39-32 calling for bids opening April 28, 1939—as I stated yesterday, I think we have the right to ask him about it, and, I therefore make it in the form of an offer of proof, that the following was included:

"Bids which require the Government to determine
21734 the f.o.b. mill price by deducting the lowest net freight rate available from a quoted 'destination cost' bid, will be considered as f.o.b. mill bids and be given due consideration with a view to the Government obtaining the supplies at the lowest delivered cost."

21735 I would offer to show, therefore, in the invitations at Fort Lewis the Government did reverse its position and did approve such a control clause and did consider destination price bids to be f.o.b. mill bids when the Government did permit it to be done; whatever freight rate was applicable.

Trial Examiner Norwood: The Counsel may show that at the proper time, but he hasn't connected it up with this witness.

Mr. Shefelman: If it please the Court, may I ask this witness before you rule on this offer of proof whether he doesn't know it to be a fact that that clause was contained in that instrument?

Trial Examiner Norwood: Which instrument?

Mr. Shefelman: Referred to by Mr. Little in his offer of proof.

Trial Examiner Norwood: In this instrument issued subsequent to his testimony?

Mr. Shefelman: That is correct.

Trial Examiner Norwood: What is the use of asking him that?

Mr. Little: In a proceeding of this kind when the witness is here on the witness stand and he made the general statement, as he did, that the control clause
was inacceptable to the Government and that
21736 he was unable to get competitive bids on account of that control clause I think, under the liberal rules which pertain in an administrative proceeding of this kind, we certainly should be permitted to ask him as to some case which happened just recently, an instance which completely

disproves any inference which may have been drawn from his testimony on direct examination.

Mr. Wooden: How can something have happened in nine months after the witness' testimony tend to disprove his testimony?

Trial Examiner Norwood: You can disprove everything he has said if you are able to do so and I shall receive it at the proper time.

Mr. Little: It certainly is admissible for this purpose as construing what this witness means by an f.o.b. mill bid and what the Government considers to be an f.o.b. mill bid.

It does show that a destination bid containing a control clause nevertheless is an f.o.b. mill bid in the opinion of the Government in the event the Government isn't deprived of the benefit—

Trial Examiner Norwood: I want you to show that if you can show it.

Mr. Paulson: Yes. We offer to prove—

Mr. Shefelman: Just a moment. You are not 21737 making any offers of proof at this time.

Mr. Paulson: I think I have a right to comment on the offer to prove and its propriety and I say I am quite sure Mr. Wooden would be willing to let this witness answer a question on that. The Government had a particular reason for making its change and this witness, I am quite sure, will tell us the facts on it and you needn't prompt him at all.

Trial Examiner Norwood: The time is short and I don't want to get into that.

Mr. Wooden: I was just about to say I am willing to waive the objection to that particular document going in because it was subject to his direct examination, providing I have some redirect on it.

Go to it, Mr. Little.

By Mr. Little:

Q. I ask you now to produce that document, Major Feldman.

A. Well, I do not recognize the particular document by the symbol number, I recognize the clause to which you have reference and I believe it is the one incorporated in our recent change which rescinded letter No. 30 and I answered, I believe, that very question the other day to the effect it was a necessity placed upon us to consider it because we had two prices quoted, one f.o.b. destination price

and then a slight differential for the purposes of
21738 applying the lowest net rate applicable in order to obtain cement, buy cement in an orderly fashion, and to insure that supply of cement and still not delay the game we had to apply the lowest net rate applicable to that price differential we had in order that we may have approved vouchers to go forward.

In other words we considered ourselves at least to be placed in a forced situation of obtaining cement under a condition not very desirable to the Government.

Q. You considered those bids as f.o.b. mill bids?

A. We asked them—

Q. I ask you to be responsive to the question. You treated those as f.o.b. mill bids, did you not?

A. Not definitely. We said for the purpose of obtaining cement we would have to consider, and our wording to our change to circular 30 has indicated that.

Mr. MacIntyre: I want to point out he identified this circular as one of the Respondents' exhibits when he was on the stand the last time, just before he was excused from the final cross-examination last week.

Mr. Withrow: There was no request for the circular.

Mr. MacIntyre: Mr. Little just has asked to produce it and Mr. Clark had it and had it marked.

Trial Examiner Norwood: Proceed.

Mr. Little: That is all. He has answered my question.

21739 Trial Examiner Norwood: Examine him.

Mr. Wooden: I take it that Counsel didn't care to offer the exhibit.

Mr. Withrow: It is already in evidence, Mr. Wooden.

Mr. Wooden: No, sir; marked for identification only. If it is, if it got in evidence, it got in over my objection and without my knowledge.

Redirect Examination by Mr. Wooden.

Q. Mr. Feldman, will you state why you have not produced the various documents that were listed in the lists sent to you by Mr. Clark?

A. We made every effort to obtain those by the quickest means possible; that is by sending a radio to Fort Riley asking specifically for these particular bids.

The records being old, as indicated by the dates in the record, the probability is, my assumption is they would be

in dead files and in storage and it would take some time and they couldn't be obtained in the time limit set.

Trial Examiner Norwood: Did you make that effort as soon as you received notice about them; the first notice?

21740 The Witness: No, sir, I merely received a copy of the letter from the defendant attorney.

By Mr. Wooden:

Q. When you speak of them being in storage do you mean that they had been placed in storage prior to the time you were requested to produce them?

A. Oh, yes; very definitely.

Q. When were they placed in storage with reference to the time of your direct examination?

A. I am merely making an assumption, there.

The general practice on any post, and I have been on duty at several of these offices, that records more than two years of age are immediately boxed and sent to storage.

Q. You said in answer to a question by Mr. Clark that you attempted not to consider the control clause. What was the result of your attempt?

A. The results were such that it was necessary to issue the instructions in this circular letter that they would not be considered. Notwithstanding that, riders were

21741 generally attached to the invitation.

Q. What kind of riders?

A. Riders—the usual type riders submitted and attached by the various bidding cement organizations, samples of which are each of these invitations (indicating Respondents' Exhibits 359 and 360).

Q. And what was the reason for your attempt not to consider the control clause?

A. It was our view, at least, after much mature thought on it—

Mr. Clark: Of course this goes entirely outside the scope of the cross-examination. I was precluded from going into it.

Trial Examiner Norwood: Is Counsel objecting?

Mr. Clark: Yes, sir.

Trial Examiner Norwood: Please rise and speak.

Mr. Clark: It was entirely outside the scope of the examination. I was precluded from going into this subject.

Mr. Clark: I was precluded from going into this subject as I recall it.

Mr. Wooden: You did go into it and he answered one of your questions; they attempted not to consider the
21742 control clause.

Mr. Clark: He is asking him, now, the results and reasons and everything of that kind on it. I didn't go into that subject, into any such subject on that.

Trial Examiner Norwood: I shall overrule the objection and if they didn't go into it I shall strike it on my own motion. I don't recall just exactly.

Complete your answer.

A. (Continuing) —that by the application of the rider we were losing the benefits of the land grant rate.

Q. And by the "rider" what do you mean?

A. It is the qualification attached to each of the bids by the cement company who offered to bid under the invitation.

21744 WENDELL HOLMES was thereupon recalled as a witness for the Commission, and, having been first duly sworn, testified further as follows:

Cross-Examination by Mr. Clark

21746 The witness identified Resp. Exs. 361-A-C, 362-A-C, 363-A-C, 364 A-C, 365 A-C and 366 A-C as standard form No. 33, the first page of which contained an invitation, bid, and acceptance representing all the bids that were received from the Quartermaster in response to the Procurement Division of the War Department request for all bids.

Q. Standard form No. 33. And this particular invitation was f.o.b. destination, was it not?

A. That is right.

Mr. Clark: Now, I will offer these in evidence, if the Court please.

Trial Examiner Norwood: Do they have a date?

Mr. Clark: Prior to his testimony, Your Honor.

21747 Trial Examiner Norwood: Prior to his testimony. And how did they relate to it?

Mr. Clark: They are to show the basis of his testimony. These are f.o.b. destination bids, and they got what they asked for, f.o.b. destination invitations.

Trial Examiner Norwood: Did he have anything to do with it, or did he base any of his testimony on it?

Mr. Withrow: His testimony at record page 2338—

Mr. Wooden: He wasn't in the service at the time, Your Honor.

Mr. Withrow: —was to the effect that the army had been unable to obtain f.o.b. mill bids on public bidding, and this has a very direct bearing upon that testimony.

Trial Examiner Norwood: Did you base any of your testimony upon these documents here?

The Witness: No, sir. The investigation I made was subsequent to the issuing of this particular invitation.

Mr. MacIntyre: And, if Your Honor please, the citation as just made to the record goes to a statement concerning f.o.b. mill bids, and this does not in any wise contradict it because it is a destination bid that is now being offered. It had nothing to do with—

Trial Examiner Norwood: Well, if it contradicts it, the Respondents are free to put it in when they put their case in, but I can't see that it relates in any way to
21748 the testimony given by this witness. It may not be used on cross-examination.

Mr. Clark: May I ask the witness a question or two about it?

Trial Examiner Norwood: Yes.

By Mr. Clark:

Q. This is the only exhibit we propose to ask you about, Mr. Holmes: What was the period covered by your examination? I think you stated the other day, but if you will refresh my memory. Didn't you say five or six months prior to the time you testified?

A. No.

Q. What was your statement?

A. I completed my investigation two or three months prior to the time I was called. It was completed prior to the time I even knew I was to be a witness in this case.

Q. Well, what period of time did you cover in the investigation, not the time you were investigating, but what period of time did it cover?

A. Well, to the best of my recollection it was for, I should say, six or nine months, possibly a year prior to issuing the circular letter No. 30.

Q. And your testimony, then, given on direct examination is based on the examination you made of transactions

during the period that you have just mentioned?
21749 Did you say six or eight months prior to the issuance of that circular?

A. That is right, plus all of the invitations that were sent in, the request to the Attorney General—in compliance with the Attorney General's request.

Q. About which you spoke the other day?

A. These right here might have been in that group, but I don't imagine they were.

Q. Yes. Well, did you examine all of the documents that were sent over to the Attorney General, and did all of them pass across your desk?

A. Yes, sir; all of them as affecting the Quartermaster Corps purchases.

Q. This affected the Quartermaster purchases, didn't it?

A. That is right, the one on the table in front of you.

Mr. Clark: I offer it again on the theory, if the Court please, that it crosses the witness' desk, he having said—

The Witness: I said I didn't know that this was offered in response to our request.

Mr. Clark: That it might have gone to the Attorney General's office.

Mr. Paulson: That doesn't tend to contradict anything the witness has said at all. It is absolutely new material.

Mr. Clark: Well, the document speaks for itself,
21750 and I offer it. I don't propose to argue that point.

Examination on Voir Dire by Mr. Wooden.

Q. Referring to these papers now under discussion, Mr. Holmes, were those produced by you here from the files of the Quartermaster's Department in Washington or were they sent in from the field in response to your request?

A. They were sent in from the field in response to a telegraphic request from the Quartermaster General's office.

Q. Do you know anything about the authenticity of those documents other than that they came from the field office of your department?

A. No, not at all. They didn't even have a covering letter of transmittal from the assignment of the Quartermaster.

21751 Mr. Wooden: I object, Your Honor, to the documents, which are not identified other than as having come from the files of the witness' department.

Mr. Paulson: I want to stress the point that it is absolutely new material.

Mr. Clark: I want to make a simple statement that—

Trial Examiner Norwood: Mr. Paulson.

Off the record.

Mr. Paulson: I want to stress the point that it is new material. I examined this witness, and I know just what the confines of the examination were. He was asked as to whether or not they had any difficulty getting f.o.b. mill bids, and he said that they did. He wasn't asked, Did they sometimes not ask for f.o.b. mill bids. That is another question. But the examination was confined to their difficulties in getting them. Now, it may be that at that time they didn't ask for an f.o.b. mill bid, but that in no way contradicts the fact that when they did ask they received a refusal. This is new material. It goes into some other ramification of Government bidding, and it doesn't tend to contradict the witness' testimony.

Trial Examiner Norwood: Mr. Clark, did you want to say something?

Mr. Clark: No, sir; I had finished. I offered it, and I am willing to stand on the record, if the Court please, 21752 on the witness' testimony.

Trial Examiner Norwood: Which ones do you offer?

Mr. Clark: I have offered them, if the Court please.

Trial Examiner Norwood: Which ones have you offered?

Mr. Clark: All of them. They all relate to the same opening. I enumerated them when I spoke to the witness.

Trial Examiner Norwood: Objection overruled. They are received as marked.

(RESP. EXS. 361-A, B, C, 362-A, B, C, 363-A, B, C, 364-A, B, C, 365-A, B, C, 366-A, B, and C, were offered and received in evidence.)

Mr. MacIntyre: If Your Honor please, it is the understanding that photostats of these are to be received instead of the originals?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: The witness can furnish us photostats but they cannot furnish us with the originals of these documents.

Trial Examiner Norwood: Counsel understand that.

Mr. Clark: We understand we will substitute photostats for the documents, of course.

Trial Examiner Norwood: Go ahead.

21753 Mr. Clark: That is all with Mr. Holmes.

Trial Examiner Norwood: Do you want to ask him anything?

Mr. Wooden: I have nothing.

Mr. Clark: Much obliged, Mr. Holmes.

The Witness: Yes, sir.

Trial Examiner Norwood: Mr. Holmes is now discharged.

(Witness excused.)

Trial Examiner Norwood: Did you have anything?

Mr. Shefelman: Not with reference to Mr. Holmes, if the Court please.

Trial Examiner Norwood: Call your next witness.

Mr. Clark: Mr. White.

Mr. Shefelman: Before Mr. White takes the stand, if the Court please, I assume that Counsel will have Mr. Fry here the first thing in the morning for his cross-examination so that we can perhaps finish up tomorrow?

Trial Examiner Norwood: Mr. who?

Mr. Shefelman: Mr. Fry.

Mr. Wooden: No, Your Honor. I undertook at noon to get in touch with the Department of the Interior to talk with Mr. Fry's assistant, Mr. Wood, I believe, and inquired regarding Mr. Fry's condition. Mr. Wood informed me that Mr. Fry was improving, that he had been at the office,

but that he was not yet back on his official

21754 duties, and in his judgment ought not to appear because of his physical condition, and that he believed that before he should appear his doctor should give permission. But aside from that, Your Honor, I want to insist again that Mr. Fry is not properly recallable here on this stipulation for deferred cross-examination, for the reason that Mr. Fry appeared as a witness and gave his direct testimony and was cross-examined and completely discharged and excused before the stipulation was entered into, and the stipulation cannot have any retroactive effect.

Trial Examiner Norwood: I think Counsel is right about that.

Mr. Shefelman: May I make a statement with reference to that?

Trial Examiner Norwood: Yes.

Mr. Shefelman: This case started, I believe, in December of 1937. I talked with Mr. Little. I was unable to come to Washington, D. C., for the case for many reasons,

including the expense to our client, who, after all, is nothing but a little mill. And when Mr. Little,—I understood that he was going to make the request of the Court, which we knew the Court would certainly grant because it was a reasonable one—we knew Counsel would stipulate to it because it was reasonable; namely, that we reserve this right of cross-examination. Now, apparently
21755 some witnesses were put on the first day, and this stipulation was made the second or third day. This all happened almost about the same time. The language of the stipulation does not make it solely prospective, and I think any reasonable interpretation of the stipulation would reserve us our right of cross-examination. I was not present at the time.

Trial Examiner Norwood: Well, the Counsel were here.

Mr. Shefelman: I was not present, if the Court please.

Mr. Wooden: You should have been.

Mr. Little: And may I add—

Mr. Wooden: You had the opportunity.

Mr. Shefelman: I wasn't present.

Mr. Little: May I add to that, Your Honor, that I wrote this stipulation out in longhand and presented it to Mr. Wooden and to Counsel for the Institute and other Respondents, including Mr. Clark, who worked with me on the stipulation the very first day of the hearing? I asked no questions of any witness and did not intend to ask any questions because I hoped and expected that Mr. Wooden would agree to the stipulation especially in the form in which I presented it to him, and Mr. Wooden very reasonably, as soon as he was able to give consideration to it, approved the form of the stipulation after making a few suggested changes.

21756 So it wasn't my intention then to cross-examine those witnesses, and I was not there for that purpose. I was there solely for the purpose of making arrangements which I hoped would be entered into.

Mr. MacIntyre: If Your Honor please, Mr. Little and Mr. Clark were both very much in evidence on December 2, 1937, at the hearings, just as Mr. Leisure.

Mr. Little: I hope I was in evidence.

Mr. Clark: We apologize, Your Honor.

Mr. MacIntyre: That was before the stipulation was entered into, and I think the record will bear me out that Mr. Clark propounded some questions to Mr. Fry on cross-

examination before he was finally excused from the witness stand, and the stipulation was entered into the next day.

Trial Examiner Norwood: Gentlemen, be that as it may, the concept of this cross-examination has been much enlarged beyond what I entertained at the time, and I am not inclined to enlarge it the least bit with regard to witnesses that were here before this stipulation was entered into, but we have these other witnesses that are called here. The time is very short, and I suggest that you go ahead, and if you get through with those, and it is convenient to have the man here, why I shall permit it anyway, regardless
21757 of any agreement about it. You may bring him back, and the Counsel from the Pacific Coast may ask him some questions.

Mr. Shefelman: Yes.

Trial Examiner Norwood: That is, provided they don't cover subjects that were covered on the previous cross-examination.

Mr. Wooden: Which witnesses, Your Honor?

Mr. Shefelman: Mr. Fry.

Trial Examiner Norwood: Mr. Fry, if you get through with these others.

Mr. Wooden: Well, it will be over my strenuous objections.

Trial Examiner Norwood: Yes.

Mr. Shefelman: We understand that, Mr. Wooden.

Mr. Little: I may state that in the notice which was given to Mr. Wooden, and a copy of which was sent to Mr. Fry, we asked certain National Park and Indian Service bids to be produced, and invitations, abstracts, and we expect those to be produced in connection with his cross-examination.

Trial Examiner Norwood: With Mr. Fry?

Mr. Little: Yes. We did ask them to be produced.

Trial Examiner Norwood: I think I will retract my remark about his being recalled, then.

Mr. Withrow: Your Honor, those documents
21758 have been collected by the Department of the Interior already.

Trial Examiner Norwood: When you get those documents together, you can summon Mr. Fry here as your witness and I shall hear him and consider receiving the documents, and everything, but not to enlarge this extra cross-examination.

Mr. Shefelman: If the Court please, this can all be done tomorrow.

Trial Examiner Norwood: I have had enough of it.

Mr. Wooden: What about Mr. Fry's physical condition?

Mr. Shefelman: This can all be done tomorrow. We are not enlarging upon the cross-examination, and our cross-examination shall be quite in proper form.

Trial Examiner Norwood: I am giving you two extra days beyond the agreement now.

Mr. Wooden: I want to say now that I shall not take one step on my own motion toward the production of Mr. Fry, for two reasons that I have already stated: One, because he is not properly recallable under this stipulation, and, secondly, his physical condition.

Mr. Little: My delayed cross-examination would only last a very few minutes, if Your Honor please, so far as Mr. Fry is concerned, and I only wish to ask him concerning the invitations of the Indian Service and the
21759 National Park Service concerning which he testified on direct. I have no desire to enlarge at all. It would only take a few minutes.

21760 Trial Examiner Norwood: Well, I think that the time for that is passed.

Mr. MacIntyre: The Commission, I am sure, will issue a subpoena for Mr. Fry if and when they feel that there is any right to the Respondents to have him called, either now or any other time.

Mr. Little: Well, if Your Honor please—

Mr. MacIntyre: They know the rule.

Mr. Little: It cannot be claimed that we are delaying this cross-examination, when we have only been here for three days, Mr. Shefelman and myself, for a total of three days, asked questions altogether which haven't consumed more than an hour or an hour and a half's time, when we expected Mr. Fry would be here. We asked that certain documents be produced which was clearly within the scope of the direct examination, and I am making this statement because we have asked them to be produced, and if they are not produced we have a right to move that all of the testimony of Mr. Fry be stricken, and if they are not produced tomorrow, naturally, we would be compelled to make that motion.

Trial Examiner Norwood: It is Counsel's privilege to make a motion, yes, indeed.

Mr. Wooden: I expected that you would.

Mr. Clark: If Your Honor please, I arise for an
21761 entirely different purpose than the present statements. First, I don't wish to be understood as acquiescing in Your Honor's ruling simply because I am silent.

Trial Examiner Norwood: Yes.

Mr. Clark: I never like to disagree with the Court, but sometimes we have to note on the record that we do, but I do want to get straightened out for tomorrow now, and without acquiescing in the views expressed by the Court, as I understand the situation, we have two more witnesses. Is that right, Mr. Wooden?

Mr. Wooden: Well, I am—

Mr. Clark: How about Mr. Custer and Mr. Ashley? That is specifically what I am asking about now.

Mr. Wooden: Mr. Custer, as I understand it, was definitely excused and discharged. As to Mr. Ashley, I called his office at the noon recess today and talked to his assistant, Mr. Lochnane, who informed me that Mr. Ashley was still in the hospital yesterday but was improving, and that while he didn't expect him at the office this week, that he might be there next week.

Mr. Clark: Well, then, that answers my question.

Mr. Wooden: He has a stone in his kidney, and they are waiting at the hospital for that stone to pass, or something like that.

21762 Mr. Clark: That answers my question. So far as I can see now, we have two for tomorrow, Mr. White and Admiral Peoples.

Mr. Wooden: That is my understanding.

Mr. MacIntyre: That is providing that Admiral Peoples can be produced. It is hoped that he can be. We know of no reason at this time that he can't be.

Mr. Clark: I wouldn't want you to perform the impossible at all, Mr. MacIntyre.

Trial Examiner Norwood: What is your pleasure, gentlemen?

Mr. Shefelman: I think we had better adjourn.

21763 Washington, D. C.,
June 15, 1939.

21779 Mr. Little: May I supplement what Mr. Clark has just said by this: My purpose is, first, to have the documents which are listed in this letter identified, and I want to offer them in evidence. Counsel, of course, can object on the grounds of immateriality, or it is not proper delayed cross-examination, but I do not think in view of what he must have told the Admiral yesterday that he should object on the ground that the Admiral isn't here, or that they are not properly identified, because, as I gather it, he told the Admiral he didn't have to be here.

Mr. Wooden: No, I didn't tell him that.

Mr. Little: In the second place, I want to show that these are all the openings, all of the bid openings—

Mr. Wooden: I will stipulate that part.

Mr. Little: —of the Producrement Division. In the next place, I want to show, and the Admiral would so testify, apparently, because he stated in his letter, I want to show that as to the two openings which are specifically listed here, proposal 15049-SP-8-8, and proposal 17132-SP-3-13 where no awards were made, and, therefore, the abstract does not show the applicable freight rate; Nevertheless, the laid-down cost to the Government, the destination cost, from the Government's point of view, in determining who was the lowest bidder, were non-identical under all bids.

The Admiral would so testify were he on the stand.

21780 Not being here, I can't prove that by these abstracts. Those are the only two things I want proved, and I told the Admiral that and I asked, then, if he would make some reference to it in the letter.

It seems to me it is extremely unreasonable for Counsel, after we have told the Admiral we would acquiesce in this, to object to this going in evidence; these two factors, Mr. Wooden tells me that he will agree that these are all the Procurement Division proposals and awards—during the period.

The only other thing I ask that he will agree on the proposal where no award was made, and don't give the applicable freight rates, they were non-identical laid-down costs to the Government of competitive bidding. It seems to me unfair and reasonable to call back Admiral Peoples to testify as to those two bids, openings, and I will have to ask him to do it if Counsel objects.

Mr. Wooden: What is the date of those?

Mr. Little: Proposal 15049-SP-8-8 was issued July 25, 1938, and the bids opened August 8, 1938; called for 5,000 barrels of standard cement, the destination was not revealed in the invitation for bids, but the abstract shows it was actually for the Bureau of Reclamation, Yakima project, Terrace Heights, Wash. There was no award made, but there is a notation on the abstract that
21781 all bids were rejected.

I want to show that applying the freight rates from mill to destination, that the destination cost to the Government under each bid was different from the other; the Admiral would so testify. It was during the period prior to his examination on direct.

The other proposal is not prior to his examination on direct, and I understand from Your Honor's previous rulings Your Honor would state it is not proper cross-examination, but as I have on two previous occasions—

Trial Examiner Norwood: Unless it were a contradictory statement to that the witness made, or something like that.

Mr. Little: My purposes in calling Admiral Peoples for delayed cross-examination are as follows:—

Mr. MacIntyre: Before you get into that can't we have a statement from Mr. Wooden as to whether he will accept the stipulation of facts you and Mr. Clark have proposed?

Mr. Clark: I think we are getting a little bit confused here. May I state for the record the type of stipulation I would like to enter into? Let us get something concrete to discuss and not ramble all over the country.

First, let me say this with respect to the opening paragraph of Admiral Peoples' letter, of which Mr.
21782 Wooden complains: I can understand, very readily, how that was phrased in the way it appears. What happened was, apparently the Admiral took the matter up with Mr. Wooden. Then Mr. Landeck got in touch with me and, subsequently, Mr. Little, and we said if Mr. Wooden would agree, we would agree.

21783 Mr. Little: I would like to add to that that I did indicate I wanted a letter of transmittal, to be sure it covered all the Procurement Division openings and, also, with reference to any proposals where applicable freight rates weren't shown we wanted it shown that they were non-identical destination costs.

Mr. Clark: The second preliminary point I want to make is this: That I want to have it distinctly understood that

none of it is for the convenience of any of the companies on the West Coast, it is for the convenience of Admiral Peoples. Beyond that I have no concern whatsoever with whether Counsel agrees or doesn't agree.

So far as the form or substance of the stipulation is concerned, I would suggest a stipulation along this line: That if Admiral Peoples were on the stand he would produce the following described documents and identify them and I would enumerate these documents in the eight paragraphs, here, and that he would testify, in addition, as follows: Then I would insert the substance of those three paragraphs.

Let me point out something else: That does not preclude Counsel from objecting to the relevancy, competency, or materiality of that testimony; it doesn't prevent him from objecting to the introduction of the documents or anything else; it just dispenses with the presence of
21784 Admiral Peoples, that is all.

Mr. Wooden: I am perfectly willing, as I have already said, to stipulate that these documents would be identified by the Admiral if he were on the stand. I am further willing to stipulate that the papers produced and submitted by this letter are the only invitations for cement bids issued by the Procurement Division and opened in Washington for cement to be used in the State of Washington since ~~March 30, 1938~~.

Mr. Clark: Might I interrupt you one second to say perhaps we can clarify that as we go along. I merely wanted you to stipulate if Admiral Peoples were on the stand he would so testify.

Mr. Wooden: I will stipulate that if he were on the stand that he would so testify.

I am further willing to stipulate that since March 30, 1938, there have been some non-identical bids submitted to the Procurement and, particularly, I am willing to stipulate that this proposal 15049-SP-8-8 issued July 25, 1938, was such a case.

Mr. Little: Of non-identical bids?

Mr. Wooden: Yes.

Mr. Little: At destination?

Mr. Wooden: Yes.

Mr. MacIntyre. No destination on it. The
21785 bidders didn't know the destination but the bids as submitted did show lack of uniformity. They bid a net price per barrel and they are not uniform.

21796 Trial Examiner Norwood: Received as marked.

(RESP. EX. 369-A to 369-Z, was offered and received in evidence.)

Mr. Little: I now offer 370-A to blank, inclusive, which consists of the proposal for cement issued July 25, 1938, No. 15049-SP-8-8, calling for bids to be opened August 8, 1938, for 5,000 barrels of cement in cloth sacks, the proposal merely indicating that the destination of the cement was the State of Washington, but no exact point revealed, but, actually, for the Yakima project, Terrace Heights, Wash.

I offer to show by this exhibit that all of the companies which bid—

Mr. Wooden: Your Honor, why is it necessary to state the purpose in offering these exhibits?

Trial Examiner Norwood: Unless there is an objection, I don't see—

Mr. Little: I don't see what is improper about it. I want to show the purpose, and I think I have a right to show the purpose of the exhibit; why I am offering it.

21797 Mr. Wooden: You are interpreting the contents of the exhibit.

Mr. Little: No.

Trial Examiner Norwood: He has a right to do that as a statement of counsel. It is not any evidence, at all; that is just his claim.

Mr. Little: Yes. I offer to show from this exhibit that each of the bidders bid f.o.b. mill as requested even though they didn't know the destination, and I also offer to show by it that the f.o.b. mill bids were non-identical in each instance, and that when applying the freight rates the destination cost, laid-down net destination cost to the Government in each case would be non-identical.

This appears to be one of the two cases mentioned in the Admiral's letter where the freight rates were not shown because the bids were rejected.

I therefore understand that counsel will stipulate that Admiral Peoples would testify, were he on the stand, that adding the applicable freight rate from the shipping points to the point of actual use to the f.o.b. mill bids as shown in the abstracts would result in non-identical destination net costs to the Government at destination.

Trial Examiner Norwood: Is that correct?

Mr. Wooden: I will stipulate that the Admiral would

so testify if he were on the stand, but I make
21798 the same objection that I made to the prior offer on the ground that it is not within the proper scope of the cross-examination.

Trial Examiner Norwood: Received as marked.

(RESP. EX. 370-A to 370-K, was offered and received in evidence.)

Mr. Little: I now offer Respondents' Exhibit 371-A to blank, inclusive, which consists of proposal No. 15049-SP-9-7, issued August 24, 1938, calling for bids to be opened on September 7, 1938, for 5,000 barrels of cement in cloth sacks, the invitation showing that the destination was the State of Washington but no exact point revealed, but actually for the Yakima project, Terrace Heights, Wash.

I offer to show by this exhibit that all of the bidders bid f.o.b. mill as requested, and that when adding the applicable freight rate from the point of shipment to the point of actual use to the f.o.b. mill bids, the net cost to the Government at destination, was non-identical in each instance with the other bids.

21799 Mr. Paulson: Isn't that true of each of the others? Can't you make that as a covering statement?

Mr. Little: I can, if Your Honor please, but I want to to be clear it applies to each bid.

Mr. Wooden: I am willing to stipulate that Admiral Peoples, if on the stand, would so testify.

Trial Examiner Norwood: Well, would testify to the factual statement, there, or his entire contentions.

Mr. Wooden: No; testify to the contents of the exhibit.

Mr. Little: That is all I am asking him to stipulate.

Mr. Wooden: I make the same objection on the same ground I did before, it being beyond the scope of proper cross-examination.

Trial Examiner Norwood: May it be understood that the same stipulations and the same proffers apply to these others?

Mr. Little: With reference to identification; I understand that the same stipulation applies to all of these exhibits in that regard.

Trial Examiner Norwood: Yes. I think as long as you stated the stipulation and stated your contentions regarding them you could just offer the rest of them all at once.

Mr. Little: There are some, if the Court please,
21800 that are after the Admiral's testimony.

Trial Examiner Norwood: Segregate these and offer the others.

Mr. Little: For the purpose of the record I will just read them rapidly.

Respondents' Exhibit 372-A to blank, a proposal being No. 15051-SP-9-22 issued September 7, 1938, calling for bids for cement to be opened on September 22, 1938, for 40,000 barrels for a destination in the State of Washington, exact point of use unrevealed.

I offer to show by this proposal and the abstract which is attached as a part of the exhibit, the same as I offered to prove with reference to the other proposals and abstracts: That they were all non-identical, both at the mill and at destination.

Do you want to make your objection as a whole after I have read the proposals or as I go along?

Mr. Wooden: I think it would be better as you go along. We are nearly through, anyway, I think.

I stipulate that Admiral Peoples would identify the papers just referred to and would testify to the truth of the documents, the contents of the documents, but I make the same objection as to the papers not being properly within the scope of the cross-examination.

Trial Examiner Norwood: That is 373, is it?

21801 Mr. Little: No, that was 372-A to blank, inclusive.

Trial Examiner Norwood: Received as marked. The objections are overruled.

(RESP. EX. 372-A to W, inclusive, was offered and received in evidence.)

(RESP. EX. 371-A to K, inclusive, was offered and received in evidence.)

Mr. Little: I now offer Respondents' Exhibit 373-A to blank, consisting of proposal No. 15052-SP-9-26, and the abstract relating thereto, issued September 12, 1938, calling for bids for 3500 barrels of cement on schedule 1 and 17,000 barrels of cement on schedule 2, to be opened on September 26, 1938.

The destination point was unrevealed except State of Washington, but the cement under schedule 1 was

21802 actually for use at Rock Island, Washington, Columbia Basin Project, and, under schedule 2, was for use at Leavenworth, Washington, Columbia Basin Project.

I offer to show by this exhibit that all bids bid f.o.b. mill as requested and after applying the applicable freight rates from the point of shipment to the point of actual use,

the net laid down cost to the Government under each bid was non-identical with the others.

21803 Trial Examiner Norwood: The same objections?

Mr. Wooden: I stipulate that if Admiral Peoples were recalled to the stand he would identify those documents and testify to their accuracy.

(RESP. EX. 373-A to 373-M was offered and received in evidence.)

Mr. Little: Now, if Your Honor please, the remaining three proposals were dated December 7, 1938, February 27, 1939, and April 19, 1939. These are subsequent to the date when the Admiral testified on direct. I am offering them in evidence on the same grounds which I offered proposals subsequent to the date of Mr. Taylor's testimony, and the testimony of another witness.

I would like to make the offer of proof with reference to these proposals knowing that Your Honor has indicated that he doesn't intend to introduce in evidence proposals subsequent. On the other hand, I think in connection with Admiral Peoples ~~it is~~ is quite proper to have these in evidence to show that, consistently, from March 30,

21804 1938, until the present time, whenever the Procurement Division has asked for bids from mills in the State of Washington on an f.o.b. mill basis he has, without exception, obtained bids in compliance with the invitations and that, without exception, the destination costs, net down laid-down destination costs to the Government, in each instance, have been non-identical, as well as the f.o.b. mills bids, themselves.

Trial Examiner Norwood: I think you could show these subsequent bids, if it connects up with something that has gone before, to show a consistent practice—.

Mr. Little: That is the purpose of the offer.

Trial Examiner Norwood: You may show that as a part of your own case, but it can't relate, in any way, to the Admiral's testimony here. That is, these later exhibits that you are now offering; you could bring that up at some other time, but I understand that the identification of that is waived.

Mr. Wooden: Yes; Your Honor, just like the others.

Trial Examiner Norwood: Those are Exhibits 374, 375, and 376?

Mr. Little: I want to make the offer of proof.

Trial Examiner Norwood: Can you include all three in that offer?

Mr. Little: Yes, I will include all three in that 21805 offer.

I now offer in evidence Respondents' Exhibit 374-A to blank, inclusive, consisting of proposal No. 15054-SP-12-21, and the abstract relating thereto, the proposal being issued December 7, 1938, calling for, under item 1, 1,000 barrels of modified cement in cloth sacks, and, under item 2, 15,000 barrels of cement in bulk, opening December 21, 1938.

I offer to show by this exhibit that the destination was not shown other than for use in the State of Washington but that the cement was actually for the Bureau of Reclamation, Yakima project, Moxee City, Wash.

I also offer to show that proposals were mailed to 16 companies, to-wit:

Pacific Coast Cement Company;
Northwestern Portland Cement Company;
Olympic Portland Cement Company;
Lehigh Portland Cement Company;
Beaver Portland Cement Company;
Spokane Portland Cement Company;
Superior Portland Cement Inc.;
Oregon Portland Cement Company;
International Portland Cement Company, of Spokane, Wash.;
Calaveras Cement Company;
21806 Pacific Portland Cement Company;
Santa Cruz Portland Cement Company;
Three Forks Portland Cement Company;
Yosemite Portland Cement Company;
Cowell Cement Company; and
Washington-Idaho Lime Products Company.

I offer to show that there were four bids in response thereto from the following companies:

The Northwestern Portland Cement Company bidding a net price per barrel f.o.b. mill of $1.95 under both schedules, with an applicable freight rate of .7641 under both schedules, with a total cost per barrel at destination of $2.7141;

That Spokane Portland Cement Company bid in response thereto under schedule 1 a net price per barrel of $1.64 f.o.b. Irwin, Wash., and under schedule 2 a net price per barrel of $1.54 with an applicable freight rate per barrel of .5508 and a total net cost per barrel at desination of $2.0908 under schedule 1 and $2.0908 under schedule 2;

That Santa Cruz Portland Cement Company bid, under schedule 1, a net price per barrel f.o.b. its storage at Portland, Ore.—

Mr. Clark: Silo.

Mr. Little: Its silo at Portland, Ore., of $2 per barrel, and under schedule 2, $1.90 net price per barrel
21807 at the silo at Portland, Ore., with applicable freight rates in both instances of $.7649, and that the total cost per barrel at destination of the bid of Santa Cruz Portland Cement Company under item 1 was $2.7649, and under item 1 was $2.6649.

And that Superior Portland, Inc., bid from its mill at Seattle, Wash., an f.o.b. net price per barrel under item 1 of $1.70, and an f.o.b. net price per barrel, Seattle, Wash., under schedule 2, of $1.60 per barrel; with applicable freight rates in both instances from Seattle, Wash., to the point of actual use, .6133 per barrel, and that a destination cost under the bid of the Superior Company from its plant at Seattle was 2.3133 under item 1, and that the total cost per barrel at destination under item 2 was $2.2130, and that Superior Portland Cement Company bid from its plant at Concrete, Wash., $1.70 net price per barrel, f.o.b. mill, under item 1, and $1.60 per barrel, net price per barrel, f.o.b. Concrete, Wash., under item 2; and that the applicable freight rates in each instance was .7869, and that the total net cost per barrel at destination to the Government under item 1 was 2.4869 and 2.3869 under item 2.

I then offer to show by Respondents' Exhibit 375-A to blank, inclusive, consisting of proposal No. 17132-SP-3-13, and dated February 27, 1939, and letter from Spo-
21808 kane Portland Cement Company to the U. S. Treasury Department, Procurement Division, dated March 8, 1939, and abstract relating thereto, calling under item 1 for 19,000 barrels of modified cement reclamation specifications and under item 2 for 28,000 barrels of cement, bids opened on March 13, 1939.

I offer to show that the proposal did not disclose any exact point of use, and merely stated the destination was in the State of Washington, but the abstract shows it was actually for the use of the Bureau of Reclamation, Yakima-Buena project, Washington.

Proposals were mailed to the following companies:

Pacific Coast Cement Company;

Northwestern Portland Cement Company;
Olympic Portland Cement Company;
Lehigh Portland Cement Company;
Beaver Portland Cement Company;
Spokane Portland Cement Company;
Superior Portland Cement, Inc.;
Oregon Portland Cement Company;
Calaveras Portland Cement Company;
Pacific Portland Cement Company;
Santa Cruz Portland Cement Company;
Three Forks Portland Cement Company;
21809 Yosemite Portland Cement Company;
Cowell Portland Cement Company;
Washington-Idaho Lime Products Company.

21810 I offer to show that in response to these proposals, the following companies bid the following net prices f.o.b. mill, and that the following freight rates applied and that the following costs per barrel at destination obtained: The Santa Cruz Company bid under Item 1 a net price per barrel of $2.00 f.o.b. silo at Portland, Oregon. The applicable freight rate was .66446, and the net cost per barrel at destination was 2.66446. By the way, I would like to call Your Honor's attention to the fact that here is a case where we have decimal points to five places, and whereas the bids of the Respondents, themselves, were in round figures of $2.00 or $1.90 or whatever it might be, so that the mere fact of an actual destination cost being carried to many decimal places doesn't indicate that there was any attempt at collusion.

Under Item No. 2, Santa Cruz Portland Cement Company bid f.o.b. mill its silo at Portland, Oregon, a net price per barrel of $1.90. The applicable freight rate from the silo at Portland, Oregon, to destination was .66446, and that the net cost per barrel at destination under Item 2 was 2.56446.

The Oregon Portland Cement Company bid under Item 1 $2 net price per barrel f.o.b. mill Lime, Oregon. The applicable freight rate was .73446, and the net cost per barrel at destination was 2.73446.

21811 Under Item 2, it bid 1.250, net price per barrel f.o.b. Lime, Oregon. The applicable freight rate was .73446, and the net cost—the net laid down cost per barrel at destination to the Government was 2.23446.

The Beaver Portland Cement Company bid under Item 1 $1.77 net price per barrel f.o.b. its mill at Goldhill, Ore-

gon. The applicable freight rate was .95011. The net laid down cost per barrel at destination was 2.72011. Under Item 2, it bid 1.67 net price per barrel, Goldhill, Oregon. The applicable freight rate was .95011.

Trial Examiner Norwood: No, I don't see any use of your reading those documents in the way of an offer of proof there, reading those little details in. You state the main point that you want to prove by that.

Mr. Little: Well—

Trial Examiner Norwood: There is no use of putting that in the record now.

Mr. Little: If Your Honor please, if Your Honor should allow me to prove these things, the abstracts would go in, and they would show just this, and I want to have the figures—

21812 Trial Examiner Norwood: I know, but you are including in your offer of proof all the arguments and details about it.

Mr. Little: No, not the arguments. I want to know the figures, themselves, to show that the destination cost to the Government, laid-down cost, was not identical. Now the best evidence is not my statement—

Trial Examiner Norwood: I don't consider that an offer.

Mr. Little: I think, Your Honor, that I am almost through. I have just one more.

Trial Examiner Norwood: You offer your conclusion. Go ahead.

Mr. Little: I have just one more after this.

Trial Examiner Norwood: All right.

Mr. MacIntyre: The documents are marked, for identification, and show what they show. If they were received in evidence they will be in evidence; if not received in evidence, then, of course, his offer of proof on them can be referred to the documents, themselves, to show what they show.

Mr. Little: I would not show these unless I made the complete offer of proof. If Your Honor please, and I think we can save time by reading the few remaining figures. We have nearly all of them in now, and

21813 it will just take me two or three minutes.

Trial Examiner Norwood: I don't want you to read any more. You finish the one you are on there.

Mr. Little: Let me proceed with this one and then—

Trial Examiner Norwood: You make an offer of proof

here; that is, you state your conclusion that you wish to establish by this evidence and say this is evidence that maintains it.

Mr. Little: I think I can cover that and abbreviate it satisfactorily to Your Honor.

I was on Beaver Portland Cement Company, under item 2. The applicable freight rate was .95011. The net laid-down cost per barrel at destination as 2.62011.

I offer to show that the award was made to the Santa Cruz Portland Cement Company on item 1, and to the Oregon Portland Cement Company on item 2, which were the lowest bidders.

I neglected to show in the offer of proof on Respondents' Exhibit 374-A to blank, inclusive, that the award on both items 1 and 2 was made to the Spokane Portland Cement Company at the lowest bidder.

I now offer to show that on Respondents' Exhibit 376-A to blank, inclusive, which consists of proposal No. 17138-SP-4-26, issued April 19, 1939, and a letter from Beaver Portland Cement Company, dated April 24, 1939, to 21814 the Procurement Division, telegram from Lehigh Portland Cement Company, dated April 25, 1939, to the Procurement Division, letter from the Lehigh copy of a letter from the Lehigh Portland Cement Company to the Treasury Department, Procurement Division, dat d April 27, 1939, copy of letter from Waldo A. Gillette, traffic manager of the Monolith Portland Cement Company, dated April 24, 1939, to Captain Collins of the Procurement Division; copy of letter from Mr. Gillette, as traffic manager for the Monolith Portland Cement Company, dated April 24, 1939, to Captain Collins of the Procurement Division; telegram from Oregon Portland Cement Company, dated April 24, 1939, to the Treasury Department, Procurement Division; telegram from Pacific Portland Cement Company to the Procurement Division, dated April 25-26, 1939; copy of telegram from Pacific Portland Cement Company, dated April 25, 1939, to the Procurement Division; copy of telegram from Spokane Portland Cement Company to the Treasury Department, April 24-25-'39; a copy of letter from Spokane Portland Cement Company, dated April 25, 1939, to the Treasury Department, and abstract of bids and the award.

I offer to show by this, which this exhibit indicates, that bids were opened April 26, 1939, for 200,000 barrels of cement that—

Mr. Withrow: What is the number of the exhibit?

21815 Mr. Little: 376-A to blank, inclusive; That the following companies—the invitations were sent to the following companies:

Beaver Portland Cement Company;
Calaveras Cement Company;
Cowell Portland Cement Company;
Lehigh Portland Cement Company;
Northwestern Portland Cement Company;
Olympic Portland Cement Company;
Oregon Portland Cement Company;
Pacific Portland Cement Company;
Santa Cruz Portland Cement Company;
Spokane Portland Cement Company;
Superior Portland Cement, Inc.;
Washington-Idaho Lime Products Company;
Yosemite Portland Cement Company;
Three Forks Portland Cement Company.

That no destination was shown—no. That this cement was to be used in the Grand Coulee Dam at Odair, Wash., and that the following companies bid in response thereto; to-wit:

Beaver Portland Cement Company;
Monolith Portland Cement Company;
Monolith Portland Mid-West Company;
Oregon Portland Cement Company;
21816 Santa Cruz Portland Cement Company;
Pacific Portland Cement Company;
Spokane Portland Cement Company;
Lehigh Portland Cement Company.

That the net prices per barrel f.o.b. the mills of all of the bidders, with the exception of the Santa Cruz Portland Cement Company, which bid f.o.b. silo at Portland, Ore., were non-identical, and that no award has yet been made in response to this proposal; that Admiral Peoples would testify, were he on the stand, that the applicable Government freight rate from the shipping points to the point of destination, and added to the f.o.b. shipping points, would result and did result in non-identical net delivered costs at destination.

I am just asking you to stipulate that he would so testify.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: I would say that I believe he would so testify if permitted to so testify over objection by Com-

mission's Counsel, on the ground that it is not within the proper scope of cross-examination, because these papers now pending were subsequent to the date of the Admiral's direct testimony.

Mr. Shefelman: You concede, however, that he
21817 would so testify, if permitted to do so?

Trial Examiner Norwood: That is what he said.

Mr. Shefelman: Yes.

Mr. Little: Yes, he has so said. Now, if Your Honor please, I want to say this—Mr. Wooden, this has to do with our stipulation.

Mr. Wooden: I would like to say also that I want to reserve the right of any necessary rebuttal that may flow from any ruling that would permit these papers—and while I am on my feet I would like to make that same reservation with regard to the preceding exhibits running from 369 to 373.

Mr. Little: Of course, we have no objection to any rebuttal that counsel may want to offer. We think that these are the complete records except as to the two proposals where freight rates weren't shown, and Mr. Wooden has consented that the Admiral would testify as indicated.

Trial Examiner Norwood: Well, the objection is sustained—

Mr. Shefelman: Wait a moment. Just a moment, please. May we have just a second?

Mr. Little: I didn't understand what Counsel said, if Your Honor please. I don't concede, of course, that Mr. Wooden can impeach his own witness, that he can deny that
these are the documents which came from the Pro-
21818 curement Division, and that they show what I have offered to show that they will show, and that the exhibits which are in the record are competent and proper. In other words, Counsel has conceded that the Admiral would so testify, and if the Admiral were here on the stand we would naturally object to any impeachment of his own witness.

Mr. MacIntyre: You wouldn't object, though, if I may ask a question—you wouldn't object, Mr. Little, however, to any effort that Mr. Wooden would put forth to have any further explanations made to anything shown in these documents, would you?

Mr. Little: Not if they would impeach the record, if Your Honor please.

Mr. Shefelman: Just a moment. We do say this—I do

object to Mr. Wooden's and Mr. MacIntyre's suggestion. I think that is a matter for redirect examination, not a matter for rebuttal, and if they wish to recall Admiral Peoples today to contradict him before the plaintiff's case is closed, that is their privilege.

Trial Examiner Norwood: I think we have gone over on a side issue here. We are deciding whether or not to take in these proffered exhibits here, all of which relate to matters that have happened since the witness testified, and they are offered here in this deferred cross-examination,
21819 and they are rejected solely because they do not belong in the cross-examination here, and relate in no way to the witness' previous testimony. So the objection is sustained, and the evidence that the Counsel has proffered here may be put in at the proper time, or may be offered when he is putting in his case at a later time.

Mr. Little: Your Honor understands that we have an exception to that?

Trial Examiner Norwood: Oh, yes, yes, indeed.

21820 Mr. Little: At all of the Government's own witness.

Completing the stipulation, if Your Honor please, and Mr. Wooden, can you listen to this, please?

Completing the stipulation, I understand that the Government will concede that Admiral Peoples would testify, were he on the stand, that these proposals and abstracts which have been received in evidence and offered in evidence are the only invitations for cement bids issued by the Procurement Division and opened in Washington, D. C., for cement to be used in the State of Washington since March 30, 1938, the date upon which the proposal for approximately 3,000,000 barrels was issued, and the only bids received in pursuant to those proposals—

Mr. Wooden: I said once before I will stipulate to that, and I say so again.

Trial Examiner Norwood: All right.

21857 Washington, D. C.,
June 16, 1939.

21899 Mr. Withrow: Your Honor, we now offer in evidence Respondents' Exhibits 379-A to G, inclusive; 380-A to M, inclusive; and 381-A and B, these being certain schedules which were sent to Counsel for the Commission and Walter B. Fry.

We are asking Commission's Counsel to waive identification of these documents and also any objection to the effect that they are carbon copies and not the original, the original now being in possession of Counsel for the Federal Trade Commission.

We are making this offer solely for the purpose of getting a ruling on the record. They really fall within the same class as the documents you just rejected.

Mr. Wooden: I make no objection on the ground as far as Mr. Withrow has indicated, and I will never raise any question about these documents being what they purport to be. I submit, however, Your Honor, that they are not evidence in the case.

Trial Examiner Norwood: What are they?

21900 Mr. Wooden: Some more lists of documents.

Trial Examiner Norwood: Let me see them.

(Documents were handed to the Examiner.)

Trial Examiner Norwood: They are just notices for papers just the same as those other documents?

Mr. Withrow: That is right; just the same.

Trial Examiner Norwood: Objection sustained. The papers are marked for identification, and you may bring them before the Commission and the courts.

21901 Mr. Withrow: We now offer in evidence, Your Honor, Respondents Exhibits 235, 236-A to P, 237, 238-A to P, 239, 240-A to M, 241, 242-A to Q, 243, 245-A to N, 246-A and B, and 247-A to F. The last page has no letter on it, Your Honor, of this last exhibit.

These papers were all identified by the Witness Rice while he was on the stand as being papers coming from the files of the War Department, being certain abstracts of bids and the duplicate of the contract or bid of the successful bidder.

Mr. Wooden: The only objection is, Your Honor, that these documents all represent new matter and fall without the scope of the Witness Rice's direct examination,

21902 and if they are to be received we reserve the right to have them rebutted, if necessary, at some future time.

21904 Trial Examiner Norwood: I think I would have received them if you would have offered them when the witness was on the stand, but I had serious doubts about your having the right had them received even then. We did it in the interest of letting in the

21905 facts, but as they are put up now, and there is a serious objection, I shall sustain the objection and

ask Counsel to bring those in when he presents his case. They are left out now solely because they are not part of the cross-examination properly.

21911 Mr. Shefelman: If it please Your Honor, I have given some serious thought since the Court ruled a day or two ago that we may not have the right to cross-examine Mr. Fry. I feel I must protect the interests of the Northwestern Portland Cement Company, my client, by making certain motions with reference to the

21912 testimony. Before doing so, however, I am going to make an offer of proof, and perhaps Counsel for the Commission may concede the testimony that he would give and thereby obviate the necessity of our moving against his entire testimony. The Court will recall that the Witness Fry testified with reference to general situations and general conditions. It is the contention of the cement companies in Western Washington that the conditions he testified to certainly do not exist in the State of Washington, and I know nothing about the situation elsewhere, and the testimony we wish to elicit on cross-examination is with reference to the conditions in the State of Washington, and I now offer to prove that if we were permitted to cross-examine Mr. Fry, he would testify to the following facts. And I may say that I am not in a position to simply hand the Reporter a copy of this offer, because we had prepared questions to propound to him, and I am going to make my offer from the questions.

21913. We offer to prove that if we were permitted to cross-examine Mr. Fry he would testify that the following are facts—

Trial Examiner Norwood: You mean to recross-examine?

Mr. Shefelman: To cross-examine. I have never had the opportunity to cross-examine Mr. Fry.

Trial Examiner Norwood: I don't think the Counsel is correct on that.

Mr. Shefelman: I wasn't here.

Mr. Wooden: You didn't stay away on account of the stipulation.

Mr. Shefelman: I stated in the record yesterday or the day before that Mr. Little left Seattle with the understanding he would request that this stipulation be made. It was made the first opportunity Mr. Little had to present it.

Unfortunately, the matter of the stipulation was not reached until, I think, the second day of this hearing, which has lasted a year and a half or two years.

Trial Examiner Norwood: Nevertheless the opportunity of cross-examining him on the part of your client was present and available to you.

Mr. Shefelman: I appreciate your Honor's theory, but I must insist that, in our judgment, we have the right of cross-examining him under our stipulation and with
21914 that position, which we must take, of course, I shall make this offer of proof at this time.

Trial Examiner Norwood: Go ahead.

Mr. Shefelman: That Mr. Fry would testify that he has been in charge of and has supervised the purchases of all branches of the Department of the Interior with the exception of the Bureau of Reclamation.

That that would include purchases for the United States Indian Service and the National Park Service.

Mr. Wooden: Didn't he already testify to that effect?

Mr. Shefelman: That is merely preliminary, Mr. Wooden, to our real offer.

That since March 30, 1938, Admiral Peoples, I believe the testimony shows, and the Procurement Division, have been supervising the purchases previously supervised by Mr. Fry.

That, in fact, Mr. Fry and the Departments for whom he supervises the purchases have received numerous f.o.b. mill bids from the the cement companies in western Washington and in the State of Washington.

Mr. Wooden: Since when?

Mr. Shefelman: During this period covered by his testimony.

That on a bid opened on July 24, 1933, by the
21915 Indian Service for irrigation district No. 2, Wapato, for 150 barrels of cement on which the request was made for a price both f.o.b. bidder's shipping point and f.o.b. Wapato, f.o.b. mill bids were received from the bidders who were the Superior Portland Cement, Inc., and the Lehigh Portland Cement Company.

That on a bid opened September 21, 1933, by the Indian Service for 600 barrels of cement the award was made to the Superior Portland Cement, Inc., on the basis of its f.o.b. mill bid on their purchase order No. 146, contract No. 1124, Indian-287.

That on a bid opening on March 19, 1934, by the Indian Service, for 300 barrels of cement on which bids were called, the award was made to the Superior Portland Cement, Inc., on the basis of its f.o.b. mill bid under purchase order No. 490. That all the bids were f.o.b. mill.

That on a bid opening on June 9, 1934, by the Indian Service, for 150 barrels of cement, the award was likewise made to the Superior Portland Cement, Inc., bidding on an f.o.b. mill basis.

That on a bid opening on December 18, 1935, by the Indian Service, for 250 barrels of cement, the bids were on an f.o.b. mill basis and the award was actually made to the Superior Portland Cement, Inc., on its f.o.b. mill bid under purchase order No. 200.

21916 That at least in so far as the Pacific Northwest is concerned, and, in particular, the State of Washington, from April, 1934, to May, 1937, both dates inclusive, the invitations for deliveries of cement to the National Park Service in Western Washington, and in the State of Washington, were all issued asking only for prices at destination points, no f.o.b. mill price bids being called for.

That, in fact, Mr. Fry and the Indian Service, had been receiving f.o.b. mill bids from cement companies in Western Washington for delivery to the Indian Service during the period covered by those two dates, or intervening between them, but no f.o.b. mill bids had been called, so far as the purchase of cement for the National Park Service in the State of Washington was concerned.

That Mr. Fry would have produced in response to the request to produce, bids for the National Park Service concerning the following National Park Service invitations and I have that in such form that I can give this to the Reporter. It is a list with four columns:

	"Date of Invitation	Date of Opening	Quantity Bbls.	Destination
	4-11-34	4-14-34	132	Dryad
	8- 9-34	8-13-34	232	Maytown
	8- 9-34	8-13-34	457	Kent
21917	8-23-34	8-27-34	150	Anacortes
	10- 8-34	10-12-34	140	Anacortes
	10-22-34	10-23-34	132	Dryad
	5- 3-35	5- 6-35	139	Kent
	5- 7-35	5- 9-35	175	Olga
	5-18-35	5-21-35	140	Cornet Bay
	6-11-35	6-13-35	202	Olga
	6-27-35	6-28-35	202	Seattle
	1-25-36	1-28-36	132	Olga
	5- 7-36	5-13-36	220¼	Seattle
	5- 7-36	5-13-36	90	Seattle
	8- 3-36	8- 7-36	181	Olga
	11- 3-36	11-12-35	188½	Seattle
	2-16-37	2-23-37	277	Seattle
	5-24-37	6- 1-37	180	Seattle"

These invitations would have refreshed the recollection of Mr. Fry, and that as a result he would have testified from his refreshed recollection that he had not, in fact, requested f.o.b. mill bids for the National Park Service in the State of Washington, and, in particular, in Western Washington for the period intervening between the two dates stated a few minutes ago.

Trial Examiner Norwood: What dates were they?

Mr. Shefelman: From April, 1934, to May, 1937, both dates inclusive.

21918 That on June 16, 1937, Mr. Fry issued an invitation for bids for 142 barrels of cement to be opened on June 22, 1937, and that invitation and request was made for a price f.o.b. car bidders plant for the use of the National Park Service in the State of Washington.

And that in response to this invitation he did receive f.o.b. mill bids, and, in fact, the contract was awarded to the Superior Portland Cement, Inc., on an f.o.b. mill bid;

That Mr. Fry, likewise, issued an invitation dated November 26, 1937, the bids to be opened December 2, 1937, for 132 barrels of cement for use by the National Park Service in the State of Washington, and in that invitation a request was made for bids f.o.b. car bidders' plant with an alternate of f.o.b. car N.P. track in Seattle—that is the

Northern Pacific—and that bids were made in accordance with the invitation and in the precise form, and that the Superior Portland Cement, Inc., was awarded the contract on that basis;

That on invitation No. 08-11, dated January 19, 1938, bids to be opened January 26, 1938, for 152½ barrels of cement, a request was made by Mr. Fry for prices f.o.b. bidders' plant with alternate bids on 110 barrels f.o.b. Beacon Rock State Park, S.P.-13, Skamania, Wash., and 42½ barrels f.o.b. Lewis & Clarke Park, S.P.-2, 21919 Route 1, Winlock, Wash.;

That in response to these invitations, bids were received f.o.b. bidders' plant on this invitation from various companies, including the Superior Portland Cement, Inc., f.o.b. Seattle, Oregon Portland Cement Company, f.o.b. Oswego, Oregon, Beaver Portland Cement Company, f.o.b. Gold Hill, Oregon, and Olympic Portland Cement Company, f.o.b. Bellingham, Wash.;

That on invitation likewise issued by Mr. Fry, the invitation bearing the number 08-17, dated January 26, 1938, bids to be opened February 1, 1938, bids were invited on 164 barrels of cement f.o.b. bidders' shipping point with an alternate of 20 barrels f.o.b. Moran Park, S.P.-1, Olga, Wash., and 44 barrels f.o.b. Deception Pass Park, S.P.-3, Oak Harbor, or an alternate of 164 barrels f.o.b. car and/or dock at Andecordes; that bids were received strictly in accordance with the invitations and the contract awarded to the Superior Portland Cement, Inc., on its bid f.o.b. shipping point;

That on invitation issued by Mr. Fry, under date of May 7, 1938, opening May 17, 1938, for 273 barrels, bids were invited on f.o.b. bidders' shipping point with an alternate of 72 barrels f.o.b. Moran Park, S.P.-1, Olga, Wash., and 201 barrels f.o.b. mill, Mullersylvania Park, S.P.-60, Olympia, Wash.; that bids were received in ac- 21920 cordance with the invitations and the contract awarded to the Superior Portland Cement, Inc., on its bid f.o.b. shipping point.

And, lastly, that he would have testified that neither the Superior Portland Cement, Inc., nor Northwestern, nor any of the plants or companies in Washington used the control clause on any of the bids for the Indian Service or for the National Park Service, and, in particular, on the bids to which I have referred to in particular.

Pardon me just a moment.

And, further, my offer is that Mr. Fry would testify that to the best of his knowledge, the specific invitations and bids referred to both in my reading of it and to be included in my offer from the list which I should give the Reporter, constitutes all of the invitations, all of the bids for the Indian Service and the National Park Service in the State of Washington between the two dates referred to; that is, from April, 1934, to May, 1937, both dates inclusive.

Mr. Little: I want to join, if Your Honor please, in the offer of proof which has been made by Mr. Shefelman, joining on behalf of the Superior Portland Cement, Inc., and add that this list of invitations and bids consists of all of the bids and abstracts and awards which we asked Mr. Fry to produce, and which have not been produced
21921 in court.

Trial Examiner Norwood: Does Counsel think that he could have gotten all of that testimony within the time limit that is covered by our agreement?

Mr. Shefelman: If the Court please, this testimony could have all been put in in 30 minutes.

Mr. Wooden: If Your Honor please, don't lose sight of the fact that Mr. Fry was excused after cross-examination before this stipulation for a deferred cross-examination was entered into.

Trial Examiner Norwood: I recall that.

Mr. Wooden: Now, if the Court please, so far as Mr. Shefelman's statement and Mr. Little's statement constitute a proposal for a stipulation of what Mr. Fry would testify to, the proposal is declined. In so far as they constitute an offer of proof, I submit that it is premature and has no place in this proceeding at the present time, because it is not a part of any cross-examination under any terms of any stipulation.

Mr. Shefelman: May I make this clear, if the Court please? I am sure the Court recognizes this: I have not made each specific instance a separate offer of proof.

Trial Examiner Norwood: Yes.

Mr. Shefelman: I wish to have the record show that I do make each specific instance and each separate
21922 item included in the offer a separate offer so that Counsel cannot later say, "Well, most of your offer

was proper, but this little point was not, and it was one offer." I am making this offer in toto and each separate item separately.

Mr. Little: May I have the same understanding on behalf of Superior?

Trial Examiner Norwood: Yes. I will say that much that Counsel has offered there appears to me to be relevant and material in this case, and something that he may properly show when the time comes for him to put in his case, but inasmuch as that witness was cross-examined and discharged prior to our entering into his stipulation, and inasmuch as none of this cross-examination could be claimed as a matter of right except under that agreement, I simply deny his right to have this witness here for a further examination, and to put in this testimony now. He may put it in later.

21923 Mr. Wooden: Your Honor understands the witness has been incapacitated from duty for some weeks past before these hearings on deferred cross began.

Trial Examiner Norwood: Yes. Well, I think that our time limit would necessarily operate to exclude that, anyway, but if we had him here, that is, if he were a witness who had testified subsequent to our agreement, I should be inclined to let him testify.

Mr. Paulson: Well, I understand Your Honor has ruled that he is not entitled to testify only on account of the shortness of time, but on the merits as well.

Trial Examiner Norwood: On any view of the case.

Mr. Paulson: Under any view of the case.

Trial Examiner Norwood: He is not entitled to be recalled for further cross-examination. This examination has gone far beyond any limits that I had in mind when I approved of this agreement, and this has gone far enough. If it goes any further it certainly would be an abuse of the right of cross-examination.

Mr. Wooden: My position, Your Honor, is that the abuse period has long since passed and not yet come.

Mr. Shefelman: Mr. Wooden will surely say that the poor little Northwestern Portland Cement Company has not been responsible for much delay in this case.

21924 Mr. Wooden: I grant you.

Mr. Shefelman: And I think Mr. Wooden will concede that we have not delayed this case; that the time we

have been granted has certainly not been any excessive time in a case of this magnitude situated where we are and as little involved as we are.

Now, in view of the Court's rejection of our offer of proof and the refusal of Counsel to stipulate or agree with reference to it, I am, of course, compelled to move in the alternative, first, that the Court strike the testimony of Fry entirely, and, in the alternative, in the event that the Court should deny that motion, that the Court enter an order confining the testimony of Mr. Fry to Respondents other than the Respondent Northwestern Portland Cement Company. In other words, limit its effect so that it shall not apply to the Northwestern Portland Cement Company in any respect.

Mr. Little: Now, if Your Honor please, I want to join in making the same motion on behalf of the Superior Portland Cement, Inc. I hereby move to strike all of the testimony of Mr. Fry since Your Honor has denied us the right of delayed cross-examination, and in that connection, I merely want to add this: That upon the very first day of the hearing in December 1, 1937, when I was
21925 present, I talked with Mr. Wooden about the matter of having a stipulation so it wouldn't be necessary for me to remain here. We discussed it only informally, that is true, because it required at least a day or so in order to agree upon the form, all of us being quite busy on the first day of the hearing. So at that time I am sure it was in Mr. Wooden's mind that some reasonable arrangement would be made. In fact, I asked that some weeks before that, and I am sure Mr. Wooden will agree with me on this: Discussions had taken place between some of the Counsel for Respondents and Mr. Wooden about the desirability of having a stipulation to enable the west coast companies to have a delayed cross-examination. So, therefore, the fact that the stipulation was not entered into until December 2 or 3 should not have any bearing upon the applicability of it to all of the testimony in the case, and I feel that my client is being deprived of a very important and serious right of delayed cross-examination without any desire or intention of delaying the case.

I want to further add that whatever Your Honor may have had in mind with reference to the 10-day period, whether he had in mind the time within which notice might be given, or whether he had in mind the fact that the

taking of testimony should not be delayed more than
21926 10 days after the giving of the notice of intention to
cross-examine, it couldn't have, in any event, any application to the duration of the delayed cross-examination. Perhaps Your Honor did have in mind that the 10-day period would begin to run from the expiration of the 15-day period because Your Honor set the hearings in this delayed cross-examination.

Trial Examiner Norwood: Well, it is in plain English.

Mr. Little: Yes, but I would like to finish.

Trial Examiner Norwood: I have discussed it with Counsel heretofore and I don't see how you could possibly give it any other construction, and besides that, you have been permitted to cross-examine every witness that we have been able to get here.

21927 Mr. Little: If Your Honor will bear with me for just one moment.

Trial Examiner Norwood: Are there any witnesses in the house here that you want to examine further? Are there any of those that are on the list?

Mr. Little: If Your Honor please, I have given notice by wire and verbally, and in other ways, that we wanted Mr. Fry here. Now, Mr. Fry—

Trial Examiner Norwood: It appears we couldn't get him here at this time, anyway.

Mr. Little: Mr. Fry was in his office on Monday morning, I was informed.

Mr. Wooden: Not at his desk for official duty, according to our information. He called in just to visit a little bit.

Mr. Little: Then, faced with that practical difficulty that Mr. Wooden mentions, we state we asked you to produce certain documents which were under Mr. Fry's control. They were listed; they were given to Mr. Wooden and to Mr. Fry many, many days ago. In number, I think there are about twenty-five. None of them are here.

We offer to stipulate with Mr. Wooden. He refuses to stipulate.

This is clearly one of the things we intended to prove,
and we should not be required to come back to
21928 Washington three or four or six months from now.

Trial Examiner Norwood: You had ample opportunity to prove that, as I already pointed out, and we have all extended every consideration and courtesy that

was practicable, and which was possible to the Pacific Coast Counsel. Now, they feel aggrieved because they can't examine some of these people that we can't get here, and we have already passed the time limitation two days, and I don't think that it sets very well. You can put this in. You are not being denied any rights of putting in testimony in your case when the time comes to put your case in.

Mr. Little: If Your Honor please, I am not, and I think Your Honor must realize, we haven't at any time during the delayed cross-examination tried to go beyond the scope of the direct examination of these witnesses; not in one instance.

Let me, furthermore, state that since Mr. Fry made this very broad statement on direct examination on December 1, that they have been unable to get f.o.b. mill bids since the Code, anyway, and implied they had been unable to get them during all the time during which he was—

Trial Examiner Norwood: Mr. Fry was cross-examined on that.

Mr. Little: Not by us, though, Your Honor.

Mr. MacIntyre: Mr. Little was present for the 21929 cross-examination, if Your Honor please.

Trial Examiner Norwood: Weren't you present when he was cross-examined?

Mr. Little: Yes, I was present, but I was there for the purpose of arranging a stipulation, and that was the only purpose, and the record will show that I did not cross-examine, and, as Mr. Shefelman has stated, I left with that purpose, and that purpose only in mind, that Mr. Shefelman remain behind, and we should not be required to come 3,000 miles from the Northwest every three or four months in a case that has already lasted two years to ask one or two questions.

I have said it before, and I say, again, there were only four witnesses whom I was primarily interested in on this delayed cross-examination. In the rest I was interested in only a minor sense.

There have been nearly 190 or 200 witnesses already on the stand in this case, and now I ask the privilege of asking just a few questions, just as Mr. Shefelman has asked that privilege, too, of a witness here in Washington who has been at his office, and I have asked to have produced certain documents, and they are not here, and the witness isn't here.

Mr. MacIntyre: If Your Honor please, on the question of those documents, let us not forget the fact
21930 that Respondents' Counsel, since they asked that Mr. Fry be required to come back here, asked the Commission to issue to the Secretary of the Interior a subpoena duces tecum for the documents, and after it was issued the Respondents' Counsel asked it be canceled and the documents not be required to be produced under the subpoena.

Mr. Shefelman: Just a moment. I want the record to show, and I think Mr. MacIntyre will concede that his shotgun statement as to Respondents' Counsel does not refer to this counsel or the Respondent he represents. I think I am entitled to such a showing in the record, in view of Mr. MacIntyre's general statement.

Mr. Wooden: You weren't here at the time, it is true.

Mr. Shefelman: Nor were we represented, Mr. Wooden.

Mr. Wooden: But Mr. Clark said he did represent you.

Mr. Shefelman: May I interrupt to say I think the record does not show Mr. Clark represented the Northwestern Portland Cement Company.

Mr. Wooden: I do want to make this statement: On May 22d, the day before this deferred cross-examination opened, I informed Mr. Clark that I did not recognize any right of deferred cross-examination under this stipulation as to Mr. Fry, and explained to him, then, Mr. Fry had appeared and had been cross-examined before the stipulation was entered into.

21931 Mr. Clark: May I add just one word to that: The Court will remember that I, in response, stated Mr. Shefelman was not available at the time that they began to cross-examine Mr. Fry.

Trial Examiner Norwood: Yes, we understand that. The whole situation is very clear.

Mr. Little: Now, if your Honor please, I have made a motion to strike the testimony of Mr. Fry.

Trial Examiner Norwood: Motion denied.

Mr. Little: In view of your Honor's ruling on the motion to strike, I move that the testimony of Mr. Fry be so limited that it not be applied to the Superior Portland Cement, Inc.

Trial Examiner Norwood: The motion is denied.

Mr. Shefelman: I don't know whether your Honor ruled formally on my motion, but I judge your Honor's ruling would be similar.

Trial Examiner Norwood: Yes, the same ruling on your motion.

21975 Mr. Clark: I have some motions, if the Court please, that will take me just a very few minutes.

Preliminarily, however, I have two things to say: One, in view of the remark by your Honor to Mr. Shefelman in which you used the term "courtesy." I am not conscious of any lack of courtesy on the part of anybody and what I shall have to say is not anything personal, at all; it is a legal argument and I want that distinctly understood, or a legal position that I take, and I want the record to show, now, I have never been treated with any greater personal courtesy than I have been here.

The second point is this: Your Honor has, two or three times, construed the stipulation entered into by Counsel from the Pacific Coast. I shan't argue your Honor's construction with you. All I shall say at the moment is

21976 this: what I have said hitherto, that I don't concur in your Honor's construction of that; that is a question of law and I fully expect to make use, if necessary, of your Honor's construction and limitation, at the proper time, in regard to that stipulation.

With respect to the motions on behalf of the Calaveras, the Santa Cruz, and the Yosemite, severally, I move in the alternative that the testimony of the witnesses Taylor, Holmes, Feldman, Armstrong, Rice, Peoples, Rothbard, Ashley, and Custer, severally, be stricken from the record, and, in the alternative, if that motion be denied, that the testimony of each and every one of those witnesses, severally, be limited so it will not apply nor will the inferences arising therefrom apply to or be held applicable against any of the clients whose names I mentioned a moment ago, the Calaveras, Santa Cruz, and Yosemite, Respondents.

Specifically, the testimony to which these motions are directed, and each of them severally is directed, in the case of the witness Taylor, is to be found at pages 241, 243, and 244 of the record; where the witness Taylor testified that the prevailing basis of bidding was f.o.b. destination and that in most instances he got f.o.b. destination bids, the latter being at page 244.

In the case of the witness Holmes the testimony to

21977 which the motions are and each of them, severally, is directed is to be found at pages 2338 and 2339. The first, in particular, to be found at page 2338, the substance being the witness said the Army has been unable to

obtain f.o.b. mill bids on public biddings. Thereafter he stated, within the pages that I have mentioned, that the Fort Leavenworth bids are typical of Army bids in general and at page 2335 he stated that invitations call for f.o.b. mill and f.o.b. destination bids and they got Government destination costs with the control clause.

The testimony of the witness Feldman, to which the motions are and each of them is directed is to be found at page 2298 in lines 9, 10 and 11, consisting of a very small bit.

The question: "Have you been successful in getting bids f.o.b. shipping point?"

"A. We have not."

The testimony of the witness Armstrong to which the motions are, and each of them is, directed is on page 2363, lines 14 to 25, and on page 2364 where the witness said, in substance, the Bureau of Prisons, regularly tried to get quotations from manufacturers on an f.o.b. shipping point basis and they have found it very difficult, if not im-
21978 possible, to get quotations, even at present.

I don't need to specify the others because they have testified so recently on the stand.

With the exception of the witness Ashley, he testified at pages 5384 and -5 in substance that the Soil Conservation Service invited bids f.o.b. mill and f.o.b. destination but generally received no f.o.b. mill bids. And the witness Custer at page 25032 of the transcript testified, in substance, that although the Navy Department has requested bids f.o.b. shipping point and f.o.b. destination over the last 10 years, bids f.o.b. shipping points have been exceptional.

The grounds of the motion with respect to the witnesses and to the testimony that I have specified in the record are as I have heretofore stated, that the statements that I have specified are based upon the so-called experience of the witness and it turns out, upon examination, that what the testimony is really based upon is an examination by the witness of documents which are not in Court, never have been in Court and haven't been made available at all, and, in two instances, it developed upon cross-examination that the documents cannot be made available.

I refer, for example, merely by way of illustration, to the order of the Attorney General's dated May 2,
21979 1939, which is Respondents' Exhibit 222, in evidence. I shan't take the time to read it all, but the

order provides that all official files, documents, and so forth, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena duces tecum is served to produce any of such files, documents, records, or information the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, must go into Court and say that he respectfully declines to do so because of this order.

The situation is further well illustrated, I think, by an incident that developed during the course of the cross-examination of the witness Feldman.

Trial Examiner Norwood: Counsel has just cited a part of the record, about that. We had full discussions of that situation.

Mr. Clark: I didn't intend to take the time to cite the whole record. I just wanted to illustrate.

Trial Examiner Norwood: All right; go ahead.

Mr. Clark: The witness Feldman testified during 21980 his cross-examination the last time he appeared on the stand that it was the practice, I think he said the custom, of the War Department or the Quartermaster to box up records that were two years old, I believe, and it therefore was obvious, and he was asked about this on his cross-examination, that five or six sets of documents called for dating November 2, 1935, and prior thereto, as early as March 14, 1935, could not be produced even in response to the letters that I wrote.

Now I quite appreciate the fact that it will possibly be argued that it was our duty, the Respondents' duty, to get these documents; that we could have gotten them with a subpoena duces tecum and that we got some of them with the notices. Now my motions are made entirely apart from either the notices to produce, which are in the record, or the subpoenaes which were issued, and the point I am making, the reason I think one of the other of the motions should be granted, was urged throughout the case; we can't meet testimony of that kind.

I have one or two motions. I am making them all at this time in the interest of brevity, but I wish it to be understood they are severally made and may be ruled on severally.

I move to strike, also in the alternative, the testimony of the witness Crapo and also the testimony of the
21981 witness Lemmon. That need no more definite specification because I am moving against all of it in the record and, in the alternative, if that motion be denied, that the testimony of each of those witnesses, severally, be limited so that it will not apply to any of the clients I named as being represented by me and on whose behalf I am making this motion, severally.

The obvious ground of that motion is that the death of those witnesses has deprived us of the opportunity to cross-examine them.

Mr. Shefelman: If the Court please, on behalf of the Northwestern Portland Cement Company I wish to join in the motions made by Mr. Clark, and, in effect, to have the testimony stricken and, certainly, in any event, to have it limited so that it will not apply so far as the Northwestern Portland Cement Company is concerned.

Mr. Little: And, if your Honor please, I wish to join in that motion on behalf of the Superior Portland Cement, Inc.; first, in the motion to strike, and, in the event that motion is not granted, that the testimony be limited so as
21985 not to apply to the Superior Portland Cement, Inc.

Trial Examiner Norwood: I didn't mean the test applied to cases where the record clearly shows it does not, but a great majority of these documents can be made available and will be made available to the Counsel. In any view of the case the motions are all denied.

22993 Washington, D. C.,
June 20, 1939.

22065 (COM. EXS. 765-A to 765-F, 766-A to 766-D, 767-A, 767-B, 768, 776, 777-A, 777-B, 778-A, 778-B, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792-A, 792-B, 793, 794, 795, and 796 were offered and received in evidence.)

22066 (COM. EXS. 2268 to 2358, inclusive, were offered and received in evidence.)

22070 (COM. EXS. 3103-A to 3103-F, 3104-A to 3104-D, 3105-A to 3105-D, 3106-A, B, 3107-A, B, 3108-A, B, were offered and received in evidence.)

(COM. EX. 3211-A, 3211-B, and 3211-C were offered and received in evidence.)

22078 Mr. Leisure: With your Honor's permission, then, the Commission having closed its case, with the ex-

ceptions your Honor has noted, we would like to make certain motions to strike on behalf of the Respondents that we represent, and for the purposes of these motions, so that the record may be entirely clear, I would like now to take a little time to read those Respondents so that these motions may appear correctly in the record we are making them on behalf of the Respondents that I am going to read now.

Trial Examiner Norwood: Yes.

Mr. Leisure: The Cement Institute;
S. W. Storey, President;
G. H. Reiter, named as Secretary;
The Vice President of The Cement Institute;
The Treasurer of The Cement Institute;
The Trustees of The Cement Institute;
Aetna Portland Cement Company;
Alpha Portland Cement Company;
Arkansas Portland Cement Company;
Ash Grove Lime & Portland Cement Company;
22079 Bessemer Limestone & Cement Company;
Castalia Portland Cement Company;
Colorado Portland Cement Company;
Consolidated Cement Corporation;
Coplay Cement Manufacturing Company;
Cumberland Portland Cement Company;
Dewey Portland Cement Company;
Diamond Portland Cement Company;
Edison Cement Corporation;
Federal Portland Cement Company, Inc.;
Florida Portland Cement Company;
Georgia Cement & Products Company;
Giant Portland Cement Company;
Glens Falls Portland Cement Company;
Great Lakes Portland Cement Corporation;
Green Bag Cement Company of Pennsylvania;
Green Bag Cement Company of West Virginia;
Hawkeye Portland Cement Company;
Hercules Cement Corporation;
Hermitage Portland Cement Company;
Idaho Portland Cement Company;
Keystone Portland Cement Company;
Kosmos Portland Cement Company;
Lawrence Portland Cement Company;
Lehigh Portland Cement Company;

Lone Star Cement Corporation, its predecessors and former subsidiaries;
Medusa Portland Cement Company;
Missouri Portland Cement Company;
Monarch Cement Company;
Monolith Portland Cement Company;
Monolith Portland Midwest Company;
National Cement Company;
Nazareth Cement Company;
Nebraska Cement Company;
North American Cement Corporation;
Northwestern States Portland Cement Company;
Oklahoma Portland Cement Company;
Oregon Portland Cement Company;
Peerless Cement Corporation;
Pennsylvania-Dixie Cement Corporation;
Petoskey Portland Cement Company;
Pittsburgh Plate Glass Company;
Portland Cement Company of Utah;
Signal Mountain Portland Cement Company;
Southern States Portland Cement Company;
Southwestern Portland Cement Company;
Standard Portland Cement Company;
Superior Cement Corporation;
Three Forks Portland Cement Company;
Trinity Portland Cement Company;
Union Portland Cement Company;
Valley Forge Cement Company;
Volunteer Portland Cement Company;
Vulcanite Portland Cement Company;
Wabash Portland Cement Company;
West Penn Cement Company;
Whitehall Cement Manufacturing Company;
Wolverine Portland Cement Company,

And the Universal Atlas Company whom we have been requested to represent for the purposes of these motions.

As to all of those companies, Your Honor, we are presenting the motions I am about to make.

Before going forward with them, I would like to call Your Honor's attention at this time to the fact that they are addressed to a record now containing more than 21,000 pages of testimony. There are also some 3,210 or more exhibits introduced on behalf of the Federal Trade Commission. A considerable portion of this testimony, as well

as a large quantity of exhibits, were received in evidence during the course of the hearing subject to their being connected up. Since the gravamen of the charge in the complaint is that of conspiracy, I take it to be obvious
under the well settled rules of law, that such con-
22082 nection would be necessary before it could be considered by Your Honor as binding against the individual Respondents. I take it to be equally obvious that not all of the evidence appearing in these 21,000 pages of testimony has been connected up against each and every one of the Respondents in this case, and also equally obvious that not all of the 3,200 exhibits affect or even remotely concern each and every one of the 75 Respondents in this proceeding. It is therefore the purpose of these motions to point out to Your Honor at this time instances wherein the testimony and exhibits should be stricken or limited as to certain individual Respondents.

I believe the usual practice in making such motions is to present them separately on behalf of each individual Respondent. Because of the number of Respondents in this proceeding, in the interests of saving time, with Your Honor's permission, we will present our motions on behalf of the various Respondents jointly and severally, if that is satisfactory to Your Honor, to be considered as though made severally and individually.

Trial Examiner Norwood: Yes.

Mr. Leisure: On behalf of each of them. If that is satisfactory, we will proceed in that manner.

22083 Trial Examiner Norwood: Yes. That applies to the Respondents that you have named there for the record.

Mr. Leisure: Yes, sir.

Trial Examiner Norwood: Yes.

Mr. Leisure: Each one individually.

The first group I would like to direct Your Honor's attention to is a group of 100-odd exhibits which for convenience may be referred to as the 1043 series, with which, I am sure, Your Honor is very familiar. This includes such exhibits as from time to time have been substituted for some of the original 1043 documents. For the sake of clarity, and in order to facilitate the study of these exhibits in the light of our motions to strike them, we have broken them down into groups to which common grounds of objections are applicable.

The first group consists of the following exhibits, and

to save time in the hearing room, with Your Honor's permission, I will just give that list to the Reporter to copy, for convenience.

1043 A	1043-3S to 3V
1043-F to i, inclusive	1043-3Z
1043 K to L, inclusive	1043-4H to 4J, inclusive
1043 N and O	1043-4Q to 4X, inclusive
1043 Q to T, inclusive	1043-5H
1043 X	1142
22084 1043 Z	1144
1043-2B	1149 to 1155, inclusive
1043-2D to 2F, inclusive	1157 B
1043-2L	1344 to 1351, inclusive
1043-2P and 2Q	1353
1043-2U	1356 to 1359, inclusive.
1043-2W	1362 to 1367, inclusive
1043-3A	1482 and
1043-3O	1483

On behalf of each of the Respondents individually, we move to strike each of the exhibits mentioned on all of the grounds heretofore stated as objections when the exhibits were offered in evidence, and on the following additional grounds:

Not one of the authors of any of these exhibits is a Respondent in this case, nor are they connected or associated with any of these Respondents in any way. The documents were written by one of the following several classes of people: Building material supply dealers; representatives of some building material supply dealers association; employees of some railroad, or officer thereof, or employees or officers of some railroad traffic association.

It is our position, and we now move Your Honor to that effect, that no proper foundation has been laid
22085 which would allow them to remain as exhibits in this case, there having been no proper foundation laid. None of the authors of these exhibits has been called to the witness stand to identify or authenticate the exhibits or to subject themselves to cross-examination. The Respondents have been wholly—

Trial Examiner Norwood: I was just wondering if it is necessary to make a motion at this time when all those objections have been made heretofore, and they are in the record and Counsel already has his exceptions.

Mr. Leisure: Well, I am, of course, not going to argue that the doctrine of last clear chance applies in actions of this kind, but I do feel that to have a correct record I have to make my motions at this time.

Mr. Wooden: I was merely rising to ask if you intended to say none of the writers of the 1043 series were called to the stand? That is the way I heard it.

Mr. Leisure: The group that I am giving the Reporter to copy is the group in which none were called and that will be very clear in the record, if you will take it from the record. I am not addressing that to the entire 1043 group.

Mr. MacIntyre: They were included in a motion by Mr. Leisure that the Commission heard on a motion to overrule the Trial Examiner's admission of those
22086 very documents.

Mr. Leisure: That is quite true.

Trial Examiner Norwood: Yes! It was appealed and the Commission has heard those points, so why make that motion now?

Mr. Leisure: That is very true. I think it is necessary at the close of a case to make the motions to strike or waive those, and that is why I am asking permission—

Trial Examiner Norwood: I shouldn't say that.

Mr. Leisure: If Your Honor overrules me and does not allow me to make them, why, that is different, but to protect my record, I am asking that permission.

Trial Examiner Norwood: Go ahead.

Mr. Leisure: The respondents have been wholly deprived of the right of cross-examination of any person who had knowledge of the contents of the documents or the circumstances under which they were originally written or prepared.

22087 Group II, the second group, consists of the following exhibits: 1043-2X, 1043-3Q, 1043-3T, 1043-4W, and 1043-4X, 1355, 1360-A and B, and 1361.

On behalf of each of the Respondents individually,
22088 we move to strike these exhibits on all of the grounds previously stated, and upon our objections made at the time they were offered, and upon the following grounds:

It does not appear on the face of any of these exhibits who wrote or prepared them, and there is no evidence in the record indicating who wrote or prepared them or the circumstances under which they were written or pre-

pared. Obviously, on that state of the record, there can be no claim that these documents are or represent the acts and declarations of anyone authorized to act on behalf of these Respondents.

22090 Under Group IV we have grouped the following exhibits: 1043-2A and 2B, 1043-2Z, 1145, 1146, 1147, 1152-A and B, 1153, 1157-A and 1354.

On behalf of each of the Respondents individually, we move as follows with respect to those exhibits:

22091 They consist of correspondence passing between third parties, namely, representatives of railroads and building supply dealers and associations. Neither the author nor the companies they purport to represent are respondents, nor have they been shown by any evidence independent of these documents or otherwise to have been connected with the combination alleged in the complaint.

The exhibits contain narratives of past events and statements of opinion and conclusions, none of which can be said to have been in furtherance of the conspiracy charged in the complaint or any of its objects. Moreover, it appears from the face of the exhibits that the statements in them were not within the knowledge of the authors, but merely repeated rumors and statements and opinions of others. They are, therefore, hearsay for all of these reasons and cannot be received even as declarations of alleged co-conspirators.

That is the motion we wish to make with respect to that group of exhibits. There is another group that comes under one heading to which I wish to direct Your Honor's attention, and that is the group 967-970, 972 to 976, and 3109. The series of exhibits, Nos. 967 to 970, 972 to 976, and 3109 consist of answers by certain Respondents and non-respondents to the Burns and Clark questionnaire, which was sent out on or about April, 1935, and cer-

22092 tain Burns and Clark correspondence and work sheets incidental to their economic survey.

At the time these documents were offered in evidence we made certain objections to their admission. The objections which we made appear on page 5526 of the record. These documents were admitted at a comparatively early stage of the case, that is, on June 3, 1938. At that time it may have been anticipated by Your Honor that before the Commission rested its case Counsel for the Commission might supply any deficiencies in order to bring these ex-

hibits within the realm of proper evidence. There were rulings that certain evidence was received subject to check, and we believe that contemplated that such deficiencies must be supplied if the exhibits were to remain in evidence.

As to these exhibits, at page 5533 of the record, Your Honor has stated that we could later raise the question as to what parts of the questionnaire and answers should be disregarded as irrelevant and immaterial. I am not attempting to quote your exact words, but that is the thought I got from it. I will be glad to have it corrected if I haven't stated it entirely correctly.

In the interests of expediting these hearings, we have broken this series of exhibits down into groups to which common grounds for our motions may apply, and again I would just give the Reporter the Group C to copy,

22093 if I may, in the record.

Trial Examiner Norwood: All right.

(967-A to 967-3T; 967-3V to 967-18N; 968, 969, 970-A to 970-3V; 970-3Y to 970-9T; 970-9W to 970-15X; 970-16B to 970-16N; 972, 973, 974-A to 974-G, 974-I to 974-4W; 974-4Y to 974-5D; 974-5F to 974-6S; 974-6U to 974-7I; 974-7K to 974-9O; 974-9Q to 974-9W; 974-10T to 974-11T; 974-9Y to 974-10R; 974-11V to 974-13B; 974-13-D to 974-13-I; 974-13K to 974-13N; 974-13P to 974-14X; 974-14Z to 974-15B; 974-15D to 974-15R; 975, 976, and 3109.)

Mr. Leisure: On behalf of each of the Respondents individually, we move to strike these exhibits on the grounds previously stated, and also upon the ground that there is no evidence in the record indicating that the companies on whose behalf these answers to the questionnaire on their face purport to have been submitted, were connected with any conspiracy alleged in the complaint at that time, or during the period of the alleged conspiracy. No proper foundation was laid for the admission of these exhibits at the time they were offered, and no foundation has since been laid. The record merely shows that the papers were produced by The Cement Institute in response to a subpoena duces tecum issued by the Federal Trade Commission.

22094 There is no showing as to who prepared, wrote, or sent these documents. No attempt was ever made to lay a proper foundation for the admission of these exhibits, except in the case of the answers purporting to have been submitted on behalf of the Volunteer

Portland Cement Company, the Lone Star Cement Corporation, and the North American Company. In those cases, the witnesses who were questioned concerning their authenticity were unable to identify the documents. That was the only attempt that was made of any kind to lay any
2095 proper basis for introducing these exhibits in evidence.

The persons who wrote or prepared the questionnaires were not called to the stand to identify the documents or to undergo cross-examination or to explain their contents. The Respondents cannot properly be bound by the acts and declarations of persons who have not been sworn and who have not been called to the witness stand by the Federal Trade Commission to give testimony in this case.

There is no evidence in the record, and no allegation or suggestion in the complaint that this survey, or any act or declaration relating thereto, was a part of the conspiracy alleged in the complaint, or represented any acts in furtherance of its objects. Several of the questionnaires' answers even appear to have been prepared by non-respondent companies, and they have been received in evidence, also. Notwithstanding the fact that they were non-respondents; they were offered in evidence by counsel for the Federal Trade Commission as binding upon these Respondents. Such companies are third parties, so far as this proceeding is concerned, and there cannot be the slightest question that it was the duty of the Government to call the witnesses who could testify to the preparation and the contents of these documents to authenticate and identify them, and to subject themselves to proper cross-examination.

The Respondents cannot fairly be bound by the
2096 unsworn and unauthenticated writings of third parties.

With reference to this group of exhibits, we have been totally deprived of cross-examination. For Your Honor's information, the questionnaire answers of the non-respondents are grouped as follows:

The Pacific Coast Company; Exhibits 967-Q to 967-FF, 968-18F to 968-18i and 974-15D to 974-15F; United States Portland Cement Company, Exhibits 967-12U to 967-13H; 968-17T; and 974-13W to 13Y.

Allentown Portland Cement Company, Exhibits 969-NN to 12A and 974-4o to 4Q.

Louisville Cement Company, 975-18L to 19N.

Republic Portland Cement Company, 976-PP to 3F

On behalf of each of the Respondents individually we move to strike the foregoing exhibits on the grounds that the companies who purport to have submitted them are not named as Respondents and there has been no evidence indicating that they were connected with the conspiracy charged in the complaint, in any way.

22097 As to group 2, the second grouping consists of portions of the Burns & Clark questionnaire answers as follows:

Exhibits 967, 968, 969, 970, 975, and 976:

On behalf of each of the Respondents individually we move to strike the following portions of these exhibits on the following grounds:

Questions 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 18, 19, 20, 22, 23, 24 and 25 and the answers thereto, on the ground that they are not in any way connected with the conspiracy charged in the complaint and it appears on their face that they are not relevant or material to any issue raised by the pleadings;

And each answer to Questions 8; 10,BV; 11; 16; 18A; 19B; 26, C-2, on the further ground that it appears from the face of the answers that they are not based upon

22098 facts within the personal knowledge of the authors and merely repeat rumors, opinions, conclusions and the statements of opinion and conclusions of third parties. They are therefore hearsay, and hearsay upon hearsay;

The answers to Question 7 in Exhibit 968 A to 968 Q;

Question 10 in Exhibit 969-14i to 969-15G;

Question 10-B in Exhibit 969-B to O, 969-2B to 3A, 969-5F to 5P and 969-6E to 6R;

Question 10 B iii in Exhibit 967-8Y to 9S and 975-14C to 14V;

Question 12-A in Exhibit 969P to 2-A and 976-14P to 15C;

Question 15 in Exhibit 967-10X to 11N;

Question 15A-2 in Exhibit 967-14Y to 15-o, 968-4E to 4U; 968-4V to 5K, 975 M to 2B; 975-12D to 12W and 968-14C to 14V;

Question 15-C2 in Exhibit 967-4Y to 5-o, 975-M to 2B; 975-12D to 12W and 975-14C to 14V;

Question 15-D to Exhibit 969-3S to 4H;

Question 15-D1 in Exhibit 969-P to 2A;

Question 18-B in Exhibit 960-8W to 10L;

Question 21-B in Exhibit 969-5W to 6L;
Question 22 in Exhibit 967-A to P;
22099 Question 22-A (3) b in Exhibit 967-9T to 10G;
Question 22-A (3) b iV in Exhibit 967-9T to 10G and 967-13i to 14E;
Question 22-B (3) b-i in Exhibit 967-9T to 10G;
Question 22-C in Exhibit 975-6W to 8D, 975-8E to 9I, and 975-9M to 10S;
Question 23-C4 in Exhibit 967-5T to 6N, 967-15P to 16i, 968-R to 4D, 968-12N to 13G, 968-15i to 15L, 968-16C to 16J, 968-16S to 16V;
Question 25 in Exhibit 970-2C, 976-5A, and 967-8M to 8X;
Question 26 in Exhibit 969-14i to 15X, 969-15V to 18A.

I move to strike these exhibits on the further ground that it appears from the face of the answers that they are not based upon facts within the personal knowledge of the authors and they merely repeat rumors, opinions, conclusions, and the statements of opinion and conclusions of third parties and are, therefore, hearsay.

Trial Examiner Norwood: They are made by the officials of those companies, are they not? Those answers?

Mr. Leisure: There is no showing, if Your Honor pleases, in these exhibits that I have just grouped here; there is no showing in the record who made
22100 them.

Trial Examiner Norwood: Do the exhibits purport to be made out by some of the officials?

Mr. Leisure: Not necessarily. I don't know who made them, myself. I can't answer Your Honor's question as to who made them.

Trial Examiner Norwood: That was my recollection of it.

Mr. MacIntyre: On that point, if Your Honor please, before we go ahead further on that, there is a key in the record showing from which company each of these questionnaires and answers to the questionnaires were submitted, and Mr. Leisure agreed in New York last June or the latter part of May that the key was a proper key to the companies' names.

Mr. Leisure: I don't want to be misunderstood. There is no dispute about these being the questionnaires of non-respondent and respondent companies.

Mr. MacIntyre: And of which Respondent companies submitted them.

Mr. Leisure: I say as to non-respondent companies whose names appear, but whether they employed third parties to make them out, who were not authorized to bind them, or how they were made up, I don't know. If Mr. Wooden does, he knows more about the subject than
22101 I do.

I don't know how they were made up and it does not appear in the record.

Mr. Wooden: I merely wish to say regardless who these parties were, whether respondent or non-respondent companies, the documents were passed as a part of and in response to certain activities set in motion by the Respondent, the Cement Institute.

Trial Examiner Norwood: Let him complete his motion and then you can cover it, later, fully.

Mr. Leisure: As to Exhibits 972, 973, and 3109, Your Honor, they consist of certain tabulations which accompanied the questionnaires of April 13, 1935, and Exhibit 974, a supplementary questionnaire related to these tabulations.

On behalf of each of the Respondents individually we move to strike these exhibits on the grounds that on their face they clearly are not connected with the alleged conspiracy charged in the complaint and are not relevant or material to any issues raised in the pleadings.

On behalf of each of the Respondents individually we move to limit each answer to the Bugns & Clark questionnaire, to its effect, if any, upon the company on whose behalf it purports to have been submitted, on all
22102 the grounds heretofore stated and on the further ground that the answers are a mere narration of past events and statements of opinion, none of which has been shown to be in furtherance of the alleged conspiracy in this case, none of which, therefore, could constitute an act or declaration which is binding upon any alleged co-conspirators.

22103 As to the next group, I would like to call Your Honor's attention to at this time—it is that group of exhibits marked 3188 to 3200, inclusive.

Exhibits 3188 to 3200, inclusive, are a series of disconnected excerpts from the record on appeal of Cement Manufacturers' Protective Association against United States, 268 U. S. 588. Only 11 of the 75 Respondent companies in the present proceeding were defendants in that case. These

excerpts were admitted, I believe, on the theory that they contained admissions by certain of these Respondents.—

We now move to strike the entire group of exhibits, No. 3188 to 3200, inclusive, on the ground that no sufficient foundation of any kind was laid that would make them binding on any of the Respondents in this proceeding.

We move to strike them on the following grounds: There has been no showing that the declarants or their companies were co-conspirators. It appears from the face of these documents that the acts and declarations are too remote. The declarations therein are wholly narrative of past events and contain opinions and conclusions of the declarants which, in no sense, can be construed to have been in furtherance of the conspiracy charged in the complaint or any of its objects.

22104 In addition, on behalf of each of the Respondents, individually, we move to strike Exhibit 3188 on the ground that it is an excerpt from the record containing the title of the proceeding and that part of the bill of complaint enumerating the corporate and individual defendants. Therefore, it appears from the face of the document that the statements contained therein are not in any way, and could not possibly be said to be declarations made in furtherance of the conspiracy alleged in the complaint in the present proceeding.

On behalf of each of the Respondents, individually, we move to strike Exhibit 3189 on the ground that it is an excerpt from disconnected pages of the unverified answer submitted in another case setting forth the history of the Association of American Cement Manufacturers, a non-respondent and a totally third party to the present proceeding. It appears from the face of the document that these excerpts were written concerning the activities of an organization not a Respondent in this case.

There is no evidence in the record indicating that these declarations were made in furtherance of the conspiracy alleged in the complaint in this proceeding.

On behalf of each of these Respondents, individually we move to strike Exhibit 3190 on the ground that it consists of part of the testimony under stipulation by

22105 an attorney for one of the defendants in another case. The testimony is concerned with the trade practices of various defendants in that case. It appears from the face of this document that it does not contain

admissions, but that it merely contains the testimony of an independent expert made many years ago concerning an organization not a respondent in this case, and a totally third party to this case.

On behalf of each of the Respondents, individually, we move to strike Exhibits 3191, 3197, 3198, 3199, and 3200 on the ground that they contain declarations concerning the freight rate service provided by the Cement Manufacturers Protective Association, a non-respondent in this case, and a totally third party to this case.

On behalf of each of the Respondents, individually, we move to strike Exhibit 3192 and 3193 on the ground that they consist of pamphlets issued by the Portland Cement Association and its predecessor, the American Association of Portland Cement Manufacturers, non-respondents in the present proceeding, and a totally third party to the present proceeding.

On behalf of each of the Respondents, individually, we move to strike Exhibits 3194 and 3195 on the ground that they consist of letters from the Portland Cement Association, a non-respondent, to the Knickerbocker 22106 Portland Cement Company, also a non-respondent.

Also, the complaint in the present proceeding does not allege or indicate that there were any persons involved in the conspiracy other than the parties named in the complaint. It appears from the face of the document that they were written many years ago, none of which could be said to have been in furtherance of the conspiracy alleged in the complaint in this case.

On behalf of each of the Respondents, individually, we move to strike Exhibit 3196 on the ground that it consists of a stipulation concerning the history of the Kurry and Seaman Patent litigation, and it includes copies of the various license agreements arising out of that litigation. These documents are wholly narrative of past events which can in no sense be construed as having been in furtherance of the conspiracy charged in the complaint in this proceeding.

The next group I would like to call your Honor's attention to is that of 2878-A to T. Exhibit 2878-A to T is a series of typewritten excerpts from proceedings had at a hearing before a Committee on Interstate Commerce, of the United States Senate, in March and April, 1936, relating to the so-called Wheeler Anti-Basing Point Bill. The

selected portions consist of disjointed parts of oral state-
ments given before the Wheeler Committee by rep-
22107 resentatives of five Respondent companies; namely, the Pennsylvania-Dixie Cement Corporation, the Universal-Atlas Cement Company, the International Cement Corporation, the Alpha Portland Cement Company, and the Keystone Portland Cement Company, as well as a part of the statement by the then general manager of The Cement Institute. The statements were not given under oath.

These excerpts were admitted in evidence on the theory that they were admissions. We move, Your Honor, on behalf of each of the Respondents to strike Exhibit 2878-A to T on the ground that no sufficient foundation has been laid either to bind the Respondents whose agents made the statements or any other Respondent.

If, as we must assume, this exhibit was admitted on the theory that it represents acts and declarations of alleged co-conspirators chargeable to the other Respondents, we move to strike it on the further ground that there has been showing that the declarants or their companies were co-conspirators; the statements have not been shown to have furthered the conspiracy charged in the complaint, or that they were made for that purpose, and, in addition the statements are wholly narrative of past events and contain the opinions and conclusions of the declarants, which
can in no sense be construed as having been in fur-
22108 therance of the alleged conspiracy in this case.

In addition, on behalf of the Respondents, individually, we move to strike certain specific portions of Exhibit 2878, as follows:

Exhibit 2878-C, beginning with the words:

"Mr. Smith: Let me carry your point a little further," and ending with the words "* * * on all your business";

on the ground that it is merely a statement of opinion and conclusion, not binding on any one but the declarant and which certainly cannot be said to be in furtherance of the conspiracy alleged in the complaint or of any of its objects.

Exhibit 2878-D, beginning with the words "Development of basing points," and ending with the words "* * * Lehigh Valley plus freight to destination"; on the ground it is merely narrative of past events which cannot be said

to have been in furtherance of the conspiracy alleged in the complaint.

Exhibit 2878-D, beginning with the words, "There is considerable freight absorption * * *" and ending on Exhibit 2878-E with the words "* * * no cross-hauling involved";

Exhibit 2878-F, beginning with the words: "The Chairman: I asked Mr. Reiter * * *" and ending on 22109 Exhibit 2878-I with the words, "The Chairman: And the Trinity Portland Cement Company of Dallas, Tex., bid the same thing." "Mr. Affleck: Yes";

Exhibit 2878-J beginning with the words, "The Chairman: On this extremely large order * * *" and ending with the words "* * * a little farmer in Beverly"; on the ground that there is no evidence in the record indicating that these declarations were in furtherance of the conspiracy alleged in the complaint or any of its objects.

Exhibit 2878-I, beginning with the words; "The Chairman: As a matter of fact * * *" and ending with the words "* * * year after year";

Exhibit 2878-I, beginning with the words "The Chairman: The bid has not been let * * *" and ending on Exhibit 2878-J with the words "* * * I should like to make a few observations";

Exhibit 2878-K, beginning with the words; "The location of the first cement mills * * *" and ending on Exhibit 2878-L with the words "* * * to common marketing territory";

on the ground that they are merely narrative of past events which cannot be said to have been in furtherance of the conspiracy alleged in the complaint.

Exhibit 2878-J, beginning with the words, "If I 22110 may take a suppositious case * * *" and ending on Exhibit page 2878-K, with the words, "Isn't that good merchandising?";

Exhibit 2878-M, beginning with the words "The Chairman: All the members * * *" and ending with the words "not all have basing prices";

on the ground it is merely a statement of opinion and conclusion, not binding on anyone but the declarant and which certainly cannot be said to be in furtherance of the conspiracy alleged in the complaint or of any of its objects.

Exhibit 2878-M, beginning with the words, "The Chair-

man: If I had trucks • • • •" and ending with the words "• • • go to his competitors";

Exhibit 2878-N, beginning with the words, "The Chairman: On these 365,000 barrels • • •" and ending with the words "• • • figures are correct";

Exhibit 2878-N, beginning with the words, "The Chairman: If you sell this • • •" and ending with the words, "Mr. Hogan: That is the net price";

on the ground there is no evidence in the record indicating that these declarations were in furtherance of the conspiracy alleged in the complaint or any of its objects.

Exhibit 2878-O, beginning with the words, "The Chairman: Now, in order that • • •" and ending

22111 on Exhibit 2878-P with the words, "The Chairman: Both before and since?" "Mr. Coogan: Yes, sir"

on the ground it is merely narrative of past events and statements of opinion and conclusion not binding on any one but the declarant and which certainly cannot be said to be in furtherance of the conspiracy alleged in the complaint or any of its objects.

Exhibit 2878-P, beginning with the words, "Mr. Coogan: Well, Mr. Chairman, you have asked some other witness • • •" and ending on Exhibit 2878-Q with the words "Mr. Coogan: Well, of course, he had no base price";

on the ground it is merely narrative of past events which cannot be said to have been in furtherance of the conspiracy alleged in the complaint or any of its objects.

Exhibit 2878-R, beginning with the words, "Mr. Scott: We are in constant knowledge • • •" and ending with the words "• • • and solicit such business";

on the ground there is no evidence in the record indicating that these declarations were in furtherance of the conspiracy alleged in the complaint or any of its objects.

Exhibit 2878-S, beginning with the words "What are the more favorable terms • • •" and ending with the words "• • • under open-price filing in the code";

22112 Exhibit 2878-T, beginning with the words "The Chairman: In the advertisement entitled, 'Wheat and Cement' • • •" and ending with the words "• • • I will grant you that, Senator Wheeler";

Exhibit 2878-T, beginning with the words "The Chairman: One of your advertisements states • • •" and ending with the words "Mr. Reiter: Generally, that is true";

on the ground they are merely statements of opinion and

conclusion, not binding on anyone but the declarant, and which certainly cannot be said to be in furtherance of the conspiracy alleged in the complaint or of any of its objects.

As we have said, the entire Exhibit 2878-A to T should be stricken on the ground that it is not connected with any of the issues in the case and is not binding on any of the Respondents. We so move Your Honor.

If Your Honor pleases, we would like to take up certain other exhibits which we are going to attempt to group, but before doing that, in the first group, I would just like to call Your Honor's attention to a few exhibits which I believe are typical of the group. I would like to hand Your Honor the first one, which is Commission's Exhibit 417-M (handing document to the Examiner).

Your Honor will observe that that exhibit is un-
22113 signed and an unaddressed memorandum. Being unsigned, the author is, of course, unidentified.

It necessarily follows that the author, not being known, it cannot be offered on the theory that the author was an alleged co-conspirator. No foundation has been laid whatever for the introduction of that exhibit in evidence. It is narrative in form, as Your Honor will observe; contains opinion, and there is nothing in it that could be said to be in furtherance of the alleged conspiracy.

It contains hearsay statements. The author, whoever it was, was not produced for cross-examination and we move Your Honor to strike it.

Trial Examiner Norwood: Where did it come from?

Mr. Leisure: I beg your pardon?

Trial Examiner Norwood: Where did it come from?

Mr. Leisure: I believe it appeared in the courtroom under some subpoena, Your Honor; exactly how it was identified I can't answer. It was not identified in any legal sense.

The next one I would like to call Your Honor's attention to is Commission's Exhibit 2203 (handing document to the Examiner). That, again, is another unsigned and unaddressed memorandum. The author is unidentified. There
22114 is no foundation in the record. It is simply a paper that was found in the files of one of the Respondents.

22115 This exhibit to which I call Your Honor's attention, now, is typical of the group that I am going

to make motions to strike, without specifying in detail that is, Exhibit 2203.

I said no foundation had been laid. The best that was shown for the exhibit was that it had been found in the files of the Respondent. The subject matter of the exhibit is material that was authorized under the N.R.A. Code, and is not part of any alleged conspiracy.

22118 Mr. Leisure: Of course, the same objection applies to this exhibit as to the preceding exhibit; there was no opportunity to examine the purported author of the exhibit.

Your Honor has asked me to make this as short as possible. Instead of reading these motions, if I may hand them up to Your Honor as though orally made I can save a couple of hours in the courtroom here in not reading them out loud.

22119 If Your Honor wishes me to do that, I would be glad to do so.

Trial Examiner Norwood: I think that would be entirely satisfactory.

Mr. Leisure: May I just have them marked as exhibits, and start with page 1? The first volume goes through from page 1 to page 280; if I may have that marked.

Trial Examiner Norwood: Mark it.

(The document referred to was thereupon marked for identification as Respondents' Exhibit 385.)

Mr. Leisure: The next volume is from page 281 to

22120 497.

Trial Examiner Norwood: Mark it.

(The document referred to was thereupon marked for identification as Respondents' Exhibit 386.)

Mr. Leisure: The Reporter, Your Honor, has just marked these two volumes Respondents' Exhibits 385 and 386, for identification, and we will offer them, if there is no objection.

Trial Examiner Norwood: They have been marked for identification, and it is the understanding that they

22121 will be filed with the Docket and transmitted to the Commission if there is an appeal on the ruling.

22125 Mr. Leisure: If Your Honor please, during the

22126 recess I think I have reached an understanding with Mr. Wooden on the most expeditious way of handling these motions. We have had marked Exhibits 385 and 386.

Trial Examiner Norwood: For identification.

Mr. Leisure: For identification. And we are—

Trial Examiner Norwood: Respondents' exhibits.

Mr. Leisure: And we are presenting them to Your Honor and ask that they be received as exhibits for the sole purpose of showing that these motions were orally made in the court room and may be referred to in the future as exhibits and as motions made by the Respondents.

Trial Examiner Norwood: But are in no sense to be considered evidence.

Mr. Leisure: In no sense to be considered evidence.

22127 Mr. Leisure: Yes, sir, I will. As to Exhibit 385, it consists of motions to strike certain of the exhibits on behalf of each of the Respondents individually whom we represent.

Trial Examiner Norwood: Consisting of how many pages, that exhibit?

Mr. Leisure: That exhibit consists of pages 1 to 280. Is that sufficient description?

Trial Examiner Norwood: I think so.

Mr. Leisure: All right.

The second exhibit is 386, which also consists of motions to strike certain of the Commission's Exhibits, and they are made also on behalf of each of the Respondents whom we represent.

Trial Examiner Norwood: How many pages?

22128 Mr. Leisure: Whose names we read off to Your Honor.

Trial Examiner Norwood: Yes.

Mr. Leisure: As though individually made. And those pages are 281 to 497.

Now, as I understand it, when these are received in evidence, we have agreed we are to give Mr. Wooden an exact copy.

Trial Examiner Norwood: Yes.

Mr. Leisure: Of those two.

Trial Examiner Norwood: Yes, they are received under the conditions named.

(RESP. EXS. Nos. 385 and 386, were offered and received in evidence.)

Mr. Leisure: If Your Honor pleases, there is one small group here which I have been unable to classify under the group which I have already made, motions already deemed

to have been made by the offer of these exhibits.

2129 From time to time Your Honor has made rulings with respect to particular exhibits limiting their effect or in some other way indicating that there was some specific condition attached to the admission of these exhibits.

In addition to our motions to strike exhibits, we would like at this time to present motions to strike certain parts of some of the exhibits to be considered in the alternative should Your Honor deny our motions to strike the entire exhibit.

Trial Examiner Norwood: Yes.

Mr. Leisure: Exhibit 366 M-N. The first such instance appears at page 2302 of the record in connection with the introduction of Exhibit 366 M-N. This is a telegram purporting to have been sent by a Major Redner who is apparently connected with the Signal Corps of the United States Army to the Quartermaster General of the United States Army. The telegram apparently refers to Exhibit 366 A-L, which is a Government invitation for, and an abstract of bids taken at Fort Riley, Kansas, in May, 1937. At the time these exhibits were offered, we pointed out to Your Honor that the telegram contained statements of conclusion and of opinion which were not properly admissible as evidence in this case and Your Honor ruled that if there were any such, they would not be considered as evidence.

2130 At this time, therefore, we specifically move, on behalf of each of the respondents, individually, to strike the following portions of this telegram which are conclusions and opinions of the writer and which are incompetent and not binding upon any of the respondents in this case:

The sentence beginning with the word "conference" on line 11 and ending with the word "origin" on line 13 on the ground that it shows on its face it is a statement of conclusion and opinion with no basis whatever having been laid for the admission of such a statement. It is pure hearsay.

The last line on Exhibit 366 M, beginning with the word "don't" and ending with the word "advertisement" in the first line on Exhibit 366 N.

Exhibit 1061 A-G. At the time these exhibits were received, Your Honor ruled at pages 4952-54 that statements of reasons and of opinion on the part of the Government

employees who wrote these documents would not be considered.

Accordingly, in the interest of clarifying the record, we move, on behalf of each of the respondents, individually, to strike the following portions of these exhibits which come within Your Honor's ruling:

Paragraph 1 of Exhibit 1061-B, beginning with the words "as we have had" on line 11 and continuing on
22131 through paragraph 2 to the end of that paragraph on page 1061 C.

The part of the full paragraph appearing on Exhibit 1061 C, beginning with the words "by doing this" in line 8 of that paragraph and ending with the words "6496 barrels" at the end of the paragraph.

Exhibit 1131 A-O. With respect to these exhibits, I want to point out to Your Honor that at page 6519 of the record you stated that the exhibits in this group numbered 1131 N to O were received on the understanding that anything in these documents which was purely hearsay would be disregarded. I assume that that ruling also applied to exhibits in this group numbered 1131-A to M because there is considerable hearsay running throughout all of them.

We move on behalf of each of the respondents individually to strike certain parts of the exhibits in this series, 1131-A to O, to according with Your Honor's ruling, on the specific grounds which I will now state:

That portion of Exhibit 1131-A beginning with the word "and" in the second line of the body of the document, and ending with the word "answer", which ends the first whole paragraph in the document, on the grounds that this is a statement by the author of the letter which repeats
22132 a statement of the addressee of the letter previously made to the author. It is obvious that this statement is pure hearsay, based upon a conclusion, and it is wholly incompetent for any purpose in the case and not binding upon any of the respondents.

The entire second paragraph of Exhibit 1131-B on the ground that it is pure hearsay and wholly incompetent, and the kind of evidence which Your Honor stated would be disregarded in this group of exhibits.

The entire first paragraph of Exhibit 1131-C on the grounds that it is a conclusion of the author for which no proper foundation has been laid, and which is incompetent, irrelevant and immaterial, and not binding upon any respondent.

Those portions of Exhibit 1131-C beginning with the words "They have", beginning paragraph 2 of the document, and ending with the word "Mississippi" in the fifth line of paragraph 2; the whole of paragraph 3 of the exhibit, and paragraph 4 of the exhibit beginning with the words "on the Institute," and ending with the words "Logansville, Ga.", in the third line of that paragraph, on the grounds that these last mentioned portions of the exhibit are purely narrative of past occurrences which have not been shown to have any relation to the conspiracy charged in the complaint, and which were not and could not have been acts or declarations in
22133 furtherance of the conspiracy charged in the complaint or any of its objects.

The following portions of Exhibit 1131-D:

The whole of paragraph 1 on the ground that it contains statements of conclusion and pure hearsay;

The entire paragraph 2 on the grounds that it also is pure hearsay and expresses the opinion of the author of the letter;

The entire paragraph 3 on the grounds that it also is a statement of pure hearsay, and, in addition, it is a narrative of some past event.

The following portions of Exhibit 1131-G-i on the grounds that they are statements of conclusion and opinion and within Your Honor's specific ruling as to this Exhibit:

The second paragraph beginning with the first word in that paragraph and ending with the words "of each year" in line eleven of that paragraph;

The second paragraph beginning with the words "The Lehigh" in lines fourteen and fifteen of that paragraph, and ending with the words "be done" in line seventeen of that paragraph.

The entire document is incompetent, irrelevant, and immaterial, and not shown to have been connected with the conspiracy charged in the complaint, and not bind-
22134 ing upon any of the respondents.

The following portions of Exhibit 1131 J-M to accord with Your Honor's ruling as to hearsay, opinion and conclusions:

The first sentence of the second paragraph on the grounds that it is a statement of a conclusion without any foundation for the statement having been laid;

The whole of paragraphs 3, 4, and 5 of the letter on the ground that they are wholly irrelevant to any issues in the case.

The entire last sentence of paragraph 2 on Exhibit 1131-K on the ground that it is a statement of conclusion and opinion without any foundation having been laid, and it represents hearsay not binding upon the Lone Star Company or any of the other respondents.

That portion of paragraph 3 on Exhibit 1131-K beginning with the third sentence and continuing to the end of that paragraph, on the ground that this entire statement is hearsay upon hearsay as shown by the face of the document.

The entire third sentence in the second full paragraph on Exhibit 1131-L.

The entire third paragraph on Exhibit 1131-L on the grounds that it is wholly irrelevant to any issue in the case.

22135 The entire fourth paragraph on Exhibit 1131-L on the grounds that it is wholly irrelevant to any issue in the case.

The whole of Exhibit 1131-M on the grounds that it is entirely irrelevant to any issue in the case.

The entire second paragraph on Exhibit 1131-N. It is obvious from the face of the document that this is all hearsay upon hearsay.

The entire third paragraph of Exhibit 1131-N on the same ground.

The entire fifth paragraph of Exhibit 1131-N on the same ground.

The entire sixth paragraph of Exhibit 1131-N, and continuing on 1131-o, and the first full paragraph on Exhibit 1131-o on the same grounds.

The entire fourth paragraph of Exhibit 1131-N on the ground that it is wholly hearsay and immaterial to any issue in the case.

Exhibit 1160 A-F. At the same time this exhibit was admitted in evidence at pages 7405-6, Your Honor said it would be received for the purpose of showing that Jenney & Lux had lost a customer "on account of the foreign cement situation" and would not be considered as proof of any so-called blacklist or for hearsay statements contained in the exhibits.

22136 Accordingly, we move to strike the following portions of these exhibits on the following grounds:

As to Exhibit 1160-A: The fourth paragraph of the letter, on the ground that it appears on its face that it is hearsay and the statement of a conclusion, and does not refer to any respondent in this case.

The fifth paragraph of the letter, on the grounds that it is hearsay, states a conclusion, and in addition, refers to a blacklist which is the specific item which Your Honor said must be disregarded in these exhibits.

As to Exhibit 1160-B: The entire body of the exhibit, since in its entirety it is hearsay and contains statements of conclusions and more particularly again refers to a blacklist, which is within Your Honor's ruling.

As to Exhibit 1160-C: The entire first paragraph on the grounds that it is a statement of opinion and conclusion and hearsay.

The entire second paragraph on the grounds that it is a statement of opinion and conclusion and hearsay.

The entire third paragraph on the grounds that is a statement of conclusion based upon the first two paragraphs, and is also hearsay.

As to Exhibit 1160-D: The entire second paragraph of this letter on the grounds that it is hearsay and it
22137 also refers to a blacklist, which comes within Your Honor's ruling.

Exhibit 1174 A-O. In this series of papers, Exhibit 1174 A-L is a report of an interview with Mr. G. S. Brown of the Alpha Portland Cement Company by Dr. W. H. Stephens and Mr. Hugh White, employees of the Federal Trade Commission. It is dated October 24, 1929, and, according to the evidence, was made on behalf of the Federal Trade Commission for its Price Bases Inquiry report.

The papers numbered 1174 M-O in this series represent correspondence between Mr. Brown and the Federal Trade Commission relating to this interview.

At the time these documents were received, Your Honor stated at page 7616-17, that the conclusions of Mr. Brown contained in the interview and in his letter were not to be considered in this proceeding. The parts of the exhibits which come within that ruling were not designated, and accordingly, we move, on behalf of each of the respondents individually, to strike the following portions of these exhibits on the grounds that they appear on their face to be

statements of conclusions and opinions of Mr. Brown which are incompetent, irrelevant and immaterial, and not binding on any of the respondents in this case, including the Alpha Company:

22138 As to Exhibit 1174-B: Beginning with the word "in" in line 12 and ending with the word "trucking" in line 14.

Beginning with the word "although" in line 16, and ending with the word "destination" in line 18.

Beginning with the word "in" in line 19 and ending with the word "job" in line 21.

As to Exhibit 1174-C: Beginning with the word "cement" in line 2 and ending with the word "manufacturer" in line 5.

Beginning with the word "for" in line 6 and ending with the word "business" in line 7.

Beginning with the word "it" in line 14 and ending with the word "country" in line 15.

Beginning with the word "truck" in line 23 and ending with the word "delivery" in the last line.

As to Exhibit 1174-D:

Beginning with the word "which" in line 1 and ending with the word "unsatisfactory" in line 2.

Beginning with the word "this" in the last line to and including the word "a" at the end of that line.

As to Exhibit 1174-E:

Beginning with the word "condition" in line 1 and ending with the word "where" in line 1.

22139 Beginning with the word "in" in line 12 and ending with the word "bid" in line 14.

Beginning with the word "in" in line 16 to the end of the page.

As to Exhibit 1174-F:

All of the lines from 1 through 6.

Beginning with the word "with" in line 8 and ending with the word "job" in line 10.

Beginning with the word "the" in line 21 to the end of the page.

As to Exhibit 1174-G:

Lines 1, 2, 3, and 4 to and including the word "year" in line 4.

Beginning with the word "for" in line 12 and ending with the word "had" in line 21.

As to Exhibit 1174-I:

Beginning with the word "the" in line 29 to the end of the page.

As to Exhibit 1174-J:

Lines 1 and 2.

Beginning with the word "in" in line 6 and ending with the word "proposition" in line 7.

As to Exhibit 1174-K:

The last six lines on that page.

As to Exhibit 1174-L:

22140 Lines 1 through 8, inclusive.

As to Exhibit 1174-N:

All of paragraph 2 on that page.

In paragraph 3, beginning with the word "cement" in line 6 of that paragraph, to the end of the paragraph.

Exhibit 1496 A-C. Exhibit 1497 A-B.

When Exhibits 1496 A-C and 1497 A-B were admitted at pages 11606 and 11608 of the Record, Your Honor stated that they would be gone over word by word on our motions to strike in order to eliminate the statements of conclusion contained in these exhibits.

Accordingly, on behalf of each of the respondents individually we move to strike the following portions of Exhibit 1496-A on the ground that if appears from the face of the exhibit that they are conclusions of the author and statements of his opinion:

Beginning with the words, "this was not," in line 2 and ending with the word "entirety" in line 6.

Beginning with the words, "Mr. Jennings" in line 7 and ending with the word "criticism" in line 8.

Beginning with the words, "only to speak" in line 10 and ending with the word "trucking" in line 11.

Beginning with the words "who rightfully" in line 13 and ending with the word "extent" in line 14.

Beginning with the words "this was" in line 19
22141 and ending with the words "Alpha companies" in line 20.

Beginning with the words "the Aetna reply" in line 21, and ending with the words "equalization point" in line 25.

Beginning with the words "especially, admitted" in line 25 and ending with the words "and further" in line 26.

Beginning with the words "Aetna was pressed" in line 27, and ending with the words "and he left" in line 32.

Beginning with the words "the rail" in line 33 and ending with the words "next 10 days" in line 38, the last line on the page.

On behalf of each of the respondents individually we move to strike the following portions of Exhibit 1496-B on the grounds that it appears from the face of the exhibit that they are conclusions of the author and statements of his opinion:

Beginning with the words "Aetna sensing" in line 1 and ending with the words "quantity of cement" in line 5.

Beginning with the words "especially when" in line 7 and ending with the words "easily overcome" in line 12.

Beginning with the words "that others" in line 12 22142 and ending with the words "choose and" in line 13.

Beginning with the words "when it had been" in line 14 and ending with the words "at that point" in line 15.

Beginning with the words "the Huron Company" in line 19 and ending with the words "to the Government" in line 20.

Beginning with the words "that would be" in line 23 and ending with the words "the Milwaukee Plan" in line 24.

Beginning with the word "confidentially" in line 25 and ending with the words "trucking plan" in line 32.

Beginning with the words "we feel" in line 41 and ending with the words "immediate future" in line 47, the last line on the page.

We further move on behalf of each of the Respondents individually to strike the following portions of Exhibit 1496-B on the grounds that they report statements and conclusions of third parties who are not named as respondents in the complaint and who have not been shown by the evidence to have been connected with the conspiracy alleged in the complaint and who have not been shown to have any authority whatever to bind any respondent:

Beginning with the words "we know" in line 33 22143 and ending with the words "correct price" in line 39.

On behalf of each of the Respondents individually we move to strike the following portions of Exhibit 1496-C on the ground that they are statements of conclusions of the author and his opinions:

Beginning with the words "will bring" in line 1 and ending with the words "those lines" in line 3.

Beginning with the words "these will become" in line 5

and ending with the words "the Aetna Plan" in line 16, the last line on the page.

22144 In addition to these motions to strike the exhibits that were received and to limit certain portions, from time to time Counsel for the Government has read all or parts of certain Commission's Exhibits into the record. We have already moved to strike those exhibits on the grounds enumerated in our formal motions, and they are contained in the exhibits offered.

In addition, we now move on behalf of each of the Respondents individually to strike those portions of the transcript wherein Government Counsel has read into the record all or part of such exhibits on the same grounds presented in our formal motions to strike the exhibits.

To save time, I will hand to the Reporter a schedule setting forth the numbers of the exhibits in question together with the page of the record at which either all or a part of the exhibit was read into the record.

Schedule "A"

Ex. No.	Page(s)	Ex. No.	Page(s)
6	84	7	97-428
8	161-165	20	567
21	579	22-A	874-877
29	667	30	667
34	686	42	729
44	745	45	751
47	774	86	802
22145 86	802	95	1327
110	1149	138 N-V	3009-3010
158 A-E	1456-1458	159-1	1461-1463
159-3 & 4	1463-1464	159-6	1464-1466
159-11	1465	159-14	1466
159-15	1466	159-24	1466-1467
159-31	1467-1468	159-32	1468-1469
159-39 to 41	1469-1474	159-42	1475
159-45	1475-1476	159-55	1476
159-57	1476	159-60	1477-1478
163-D	1503-1504	163-G	1504-1505
163-J	1505-1506	164-D	1515-1516
164-I	1523-1524	173Q	1551-1553
174 A-B	1557-1558	174 C-D	1558-1559

Ex. No.	Page(s)	Ex. No.	Page(s)
174-E	1559-1561	174-H	1561
174-I	1561-1562	174-J	1562-1564
184-I	1598-1599	189-H	1619-1620
190-E	1625		
287	6206, 6212	277-D-E	3
	6213, 6215	289-D	6348-6349
342	1948-1949	343-A-B	1958-1959
344 A-E	1980-1981	346 A-E	2005-2008
	1982-1984		
	1984-1987		
	1990-1991		
	1991-1993		
	1995-1996		
22146 348 A-B	2050-2051		
352 A-D	2076	351-A-F	2068-2070
359	2130-2131	354 B-D	2087-2090
374	2474-2475	366 M-N	2319-2320
625-D	3510	385-A	2547

I have also an alternative motion to address to Your Honor where, if Your Honor should not strike the exhibit, to limit certain portions of it.

Where the motion of any Respondent to strike any exhibit is denied, I move in each such case, on behalf of each such respondent, that a ruling be made that such exhibit not be considered against it. In support of these motions, I urge the following grounds:

1. That no statement or reference in any exhibit should be binding upon or considered as evidence establishing or tending to establish the participation in the conspiracy of any person or company other than the person who wrote the exhibit and the company, if any, on whose behalf the author wrote the exhibit as its agent making a report concerning his own actions in behalf of the company in the regular course of business.

2. That any exhibits written by persons not alleged in the complaint or shown by the evidence to have
22147 had any connection with the alleged conspiracy, should be considered only as evidence that the recipients were informed of the alleged facts stated in them, and in the absence of proof that a respondent adopted statements in such exhibits as its own, should not be considered as evidence that the alleged facts actually occurred.

3. That declarations appearing in any exhibit which are found to have been made by a Respondent should not be considered as evidence of the allegtd facts which they recite as against any other respondent, unless they are shown to have been adopted by such other Respondent, or the declarant and the Respondent against whom the declarations are received are expressly found to have been connected by other independent evidence with the conspiracy alleged in the complaint, and the declarations are found to have been made during and in furtherance of the objects of the conspiracy alleged in the complaint.

4. That any statement occurring in any exhibit which, by expressions appearing on its face or by the testimony of the author, shows that such statement was not made from the personal knowledge of the author but was merely a repetition of the statements and opinions of others, should not be considered as evidence of the alleged facts recited in any such statement.

If Your Honor please, that concludes our motions
22148 to strike exhibits. We do, however, have some motions to urge at this time with respect to striking testimony of various witnesses who testified on behalf of the Commission.

Trial Examiner Norwood: The last of the motions either read or marked, for identification, there, and received, I shall defer the ruling on them until I have time to read the motion.

Mr. Leisure: Defer the ruling on the motions?

Trial Examiner Norwood: Yes.

Mr. Leisure: The motion to strike the testimony is limited of course to the testimony adduced from witnesses on direct and redirect examination by Counsel for the Commission. The first one I would like to call for Your Honor's attention to is to strike certain portions of the testimony of the following witnesses for the Com-
22149 mission: Robert H. Armstrong, of the Bureau of Prisons, A. M. Ashley, of the Department of Agriculture; Leonard K. Astell, of the Wisconsin Highway Commission; W. Z. Betts, of the North Carolina State Highway Commission; E. W. Blom, of the Iowa State Highway Commission; Arthur Colegrove, of the Pennsylvania Department of Highways and Supplies; A. B. Custer, of the Navy Department, Bureau of Supplies and Accounts; Major Feldman, of the War Department, Quarter-

master Corps; W. H. Foley, of the Indiana State Highway Commission; W. B. Fry, of the Department of the Interior; C. A. Hamlin, of the Bureau of Construction, Division of Highways, Illinois; W. E. Harkness, of the Florida State Procurement Office of the Treasury; H. E. Harman, Jr., of the Georgia State Procurement Office of the Treasury; W. E. Hayglie, of the Procurement Division of the U. S. Treasury; H. B. Henderlite of the Louisiana Highway Commission; G. T. Lemmon, of the Virginia Department of Highways; Y. E. McClendon, of the Oklahoma State Highway Commission; J. E. McNair, of the Mississippi State Procurement Office; D. P. Nicklin, of the Los Angeles Department of Water and Power; Admiral C. J. Peoples, Director of Procurement for the U. S. Treasury; F. V. Reagel, of the Missouri State Highway Department; H. H. Rice, of the War Department, Engineers' Corps; Sol Rothbard, of the Bureau of Reclamation; P. I. Taylor, of the Bureau of Reclamation, and
22150 L. L. Thornhill, of the Arkansas State Procurement Office, U. S. Treasury.

During the course of this proceeding testimony of these witnesses has been admitted which was expressly stated to be or obviously was based in whole or in part on documents in the files of the witnesses' or in the files of the Government agency to which the particular witness was attached. In no instance with respect to the testimony to which this motion is directed were the basic documents themselves offered in evidence by Counsel for the Commission, nor were they produced for our examination although we made objection to this procedure on many occasions, and stated our desire that they be so produced. In some instances, Counsel for the Commission stated that it would be inconvenient to produce the documents upon which particular testimony was totally or partially based for reasons of location of the documents or of their volume. We did not, however, withdraw any of our objections nor have we intended to waive any of our rights in the premises.

On behalf of each of the Respondents individually, we now move to strike specific portions of the testimony of these witnesses listed in the attached Schedule A on all of the grounds stated at the time the testimony was admitted and upon the following grounds:

The documents themselves are the best evidence
22151 of the matters testified to.

None of the witnesses were shown to be competent to summarize or draw conclusions from the documents in question.

Even if the witnesses themselves were so qualified, the documents themselves have not been produced for inspection by Counsel for Respondents.

The documents not having been produced, the Respondents have been deprived of their opportunity to cross-examine the witnesses fully on the testimony based on the documents and cannot properly be bound thereby.

The designated portions of the testimony of these witnesses are incompetent, irrelevant, and immaterial, and not binding on any of the Respondents.

Motions to strike testimony based on documents not produced:

Schedule A

Witness	Page	Line	Page	Line
Robert H. Armstrong	2361	6	2364	23
	2391	7	2392	10
	2393	5	2394	6
	2414	16	2415	3
	2417	12	2418	15
A. M. Ashley	5376	9	5380	18
	5383	21	5387	18
22152	5399	6 to 20		
	5400	10	5462	18
	5413	13 to 18		
	5414	2	5415	13
	5416	7	5417	2
	5417	19	5418	12
	5431	19	5444	17
	5479	18 to 23		
	5481	13 to 18		
	5482	7	5483	13
L. K. Astell	12144	11	12146	19
	12147	14 to 16		
	12148	9	12150	8

Witness	Page	Line	Page	Line
W. Z. Betts	372	5	375	18
	381	21	383	17
	387	23	389	24
	393	1 to 8		
E. W. Blom	11619	2	11623	12
Arthur Colegrove	395	24	398	4
	399	17 to 20		
	405	24	406	24
A. Boyd Custer	2529	25	2532	23
	2533	15 to 20		
	2537	10 to 20		
	2540	15	2541	4
22153	2543	13 to 17		
	2550	25	2551	12
	2553	20	2554	20
	2558	2 to 24		
Herman Feldman	2292	13 to 18		
	2293	3 to 8		
	2295	1 to 5		
	2298	5 to 11		
	2323	10	2324	3
W. H. Foley	11736	11	11737	6
	11810	5 to 12		
W. B. Fry	132	2 to 19		
	133	11 to 15		
	166	10	168	22
	171	20	173	13
	182	14 to 21		
	183	22	184	6
	185	3	186	19
	187	23	190	22
	191	12 to 14		
	193	5 to 6		
	216	5 to 16		
	216	24	217	23
	218	11 to 21		
22154	219	16	220	1
	220	13	224	14
	233	4	234	5

Witness	Page	Line	Page	Line
C. A. Hamlin	11823	8	11824	4
	11825	3	11827	1
	11828	1 to 16		
	11829	24 to 25		
	11830	17	11832	3
	11833	1	11835	7
	11837	2 to 16		
	11984	22	11985	13
W. E. Harkness	4896	7	4897	6
	4901	11	4902	6
	4914	12 to 17		
	4915	7	4916	22
	4917	6 to 10		
	4917	22	4920	7
	4923	12	4925	10
H. E. Harman, Jr.	4777	1 to 18		
	4779	1	4781	1
	4783	4	4784	17
	4789	3	4790	3
	4791	20 to 27		
	4793	1 to 3		
22155	4796	11 to 16		
	4803	19	4804	8
	4805	12	4806	6
	4854	16 to 22		
W. E. Hayghe	1831	16	1835	21
	1840	10	1842	14
	1843	3	1844	1
	1846	19	1848	22
	1864	11	1865	16
	2195	18 to 21		
	2198	4	2202	25
	2210	5 to 10		
	2211	12 to 14		
	2212	1 to 4		
	2214	6	2215	17
	2252	18	2253	16
	2256	17 to 23		
	2257	9 to 25		
	2258	12	2260	9
	2268	23	2271	13

Witness	Page	Line	Page	Line
	2457	20	2458	17
	2468	19 to 21		
	2469	14 to 18		
	2474	20	2475	1
22156	2486	10 to 25		
	2487	25	2488	12
	2488	24	2489	2
	2490	20	2491	5
	2495	21	2496	1
	2498	3	2499	21
	4860	21	4864	10
H. B. Henderlite	13794	11	13798	10
G. T. Lemmon	345	10	346	25
	361	16	362	3
	362	18	364	14
	368	8	369	2
	369	21	370	7
Y. E. McClendon	13931	9	13937	14
J. E. McNair	4938	24	4940	12
	4940	13 to 17		
	4950	10 to 22		
	4943	1 to 10		
	4943	18	4944	5
	4944	23	4945	20
D. P. Nicklin	9294	10 to 12		
	9295	4 to 18		
	9296	17 to 18		
	9297	10	9298	3
22157				
Admiral C. J. Peoples	9982	10	9984	14
	9986	1	9987	25
	9988	14	9989	17
	9992	10	9993	19
	10003	19	10004	4
	10007	1 to 6		
	10008	2	10010	9
	10012	15 to 16		
	10013	25	10015	2
	10217	12	10218	5

Witness	Page	Line	Page	Line
	10223	1 to 8		
	10229	5 to 9		
	10231	7 to 15		
	10509	2	10510	22
F. V. Reagel	13760	14	13765	2
Herbert H. Rice	1437	15	1438	20
	1447	24	1448	20
	1450	20	1452	15
	1453	2 to 11		
	1453	19	1454	14
	1494	2 to 13		
	1500	5 to 16		
	1525	1 to 10		
	1782	9 to 12		
22458 Sol Rothbard	1118	18	1122	20
	1139	16 to 18		
	1140	8 to 14		
	1142	7 to 10		
		20 to 24		
	1155	25	1157	11
P. I. Taylor	239	10	240	4
	240	23	243	22
	244	22	248	2
	258	23	259	3
	275	3 to 18		
	319	25	320	4
	326	10	328	9
	330	23 to 24		
	1279	20	1280	10
	1282	6	1283	3
	1294	3	1295	1
	1297	15	1298	2
	1322	9	1323	18
L. L. Thornhill	14092	15	14093	21
	14094	13	14095	2
	14095	23	14096	8
	14100	22	14101	3
	14108	18 to 22		
	14109	9 to 12		

	Witness	Page	Line	Page	Line
22159		14110	5 to 10		
		14111	8 to 11		
		14111	19 to 25		
		14115	9 to 10		
		14115	15 to 19		
		14116	10 to 16		
			22, 25		
		14117	1	14118	5
		14119	19	14120	8
		14121	23	14122	15
		14125	18 to 23		
		14127	15 to 17		
		14128	3 to 4		
		14128	25	14129	12
		14129	18 to 23		
		14130	10 to 14		
		14166	4	14167	13
		14173	18 to 20		
		14174	2 to 6		
		14174	21	14176	2
		14176	24	14180	5
		14180	12	14181	9
		14182	2 to 13		
		14182	20	14183	12
		14184	12 to 14		
		14184	24	14186	5
22160		14187	14 to 22		
		14188	5 to 10		
		14188	25	14189	25
		14190	4 to 10		
		14190	23	14191	9

22161 Washington, D. C.,
June 21, 1939.

22165 Page 22091, in line 21, insert the word "to" before the word "which."

22166 Page 22093, line 9, listing certain exhibits, should read as follows: "974-13B; 974-13D to 974-13-I; 974-13K to 974-13N," and line 10 should read: "974-13P to 974-14X." The rest of that line is all right.

Page 22095, line 25, strike out the word "be" before the word "fairly."

Page 22096, line 7, after "Exhibit 968," the identifying mark should be "18F" instead of "F18," and at the end of that line the exhibit should be "974-15F" instead of "174."

22170 (COM. EXS. 1128-H, 1129-E, and 1129-F, were offered and received in evidence.)

(COM. EXS. 1081-DD, and EE, was offered and received in evidence.)

22173 Mr. Leisure: And I don't think all the motions to strike have been made or ruled upon, and in the interest of saving every possible moment in the courtroom that we could, we have, with respect to these motions, taken the same procedure as the motions addressed to the exhibits; and we have prepared them in the shortest possible form, and I will be very brief.

At this time I wish to make motions on behalf of each of the Respondents, individually, concerning certain of the testimony of Commission's witnesses Duddy, Hibbard, Viner, and Fetter.

22174 The testimony of Dr. Duddy, to which we refer, will be found on pages 15258 to 15339; 15402 to 15411, and 15413 of the record.

Of Dr. Hibbard, the testimony will be found at pages 15413 to 15476; 15588 to 15613, and 20596.

Of Dr. Viner—

Mr. Wooden: Pardon me, Mr. Leisure. May I inquire whether your motion comprehends the whole of the testimony of these witnesses?

Mr. Leisure: No, that is why I am doing this, Mr. Wooden. It wouldn't be necessary to do this if it did comprehend the whole of the testimony.

Trial Examiner Norwood: You are specifying the pages and lines?

Mr. Leisure: Not the lines, the pages; it will be clear. Of Dr. Viner, pages 15619 to 15704, and 15991 to 16033.

Of Dr. Fetter, at pages 17634 to 17776, and 18516 to 18579.

We move to strike all this testimony of these witnesses appearing on those pages of the record on the grounds that the hypothetical questions upon which it is based assume material facts not supported by the competent evi-
dence in the record, and that there has been no
22175 showing whatever with respect to some of the ques-
tions that the facts assumed were even intended to be based on any evidence in the record whatever.

I would like, as to some of those questions, to cite the following pages, Your Honor, for consideration:

15642 of the record, 15649, 15659, and 17723. We move to strike all of the testimony of each of the witnesses appearing on the pages of the record above mentioned on the further grounds that in no case has there been a showing that the witness had any experience which would authorize him to make statements concerning manufacturing industries or marketing methods in those industries, and that, in the case of Drs. Duddy and Hibbard, the testimony of each affirmatively shows that his sole experience has been in the unrelated field of agriculture.

With respect to Dr. Viner's testimony, we move to strike that portion appearing on pages 15651 and 15652 of the record on the ground that the opinions there called for and given are on matters of fact which do not require expert knowledge.

We move further to strike all of the testimony of Dr. Fetter on the above cited pages of the record on the grounds that it clearly appears from the record that in stating his opinions in answer to hypothetical questions
he has based them, in part, on matters not included
22176 in the questions.

All of the testimony referred to above is, therefore, incompetent, irrelevant, and immaterial, not connected with the issues of the case, and not binding on any of the Respondents. We, therefore, move to strike it at this time.

With respect to the testimony of Dr. Fetter, we make further motions against it as to the lines and pages following:

Page 17671, line 4, to page 17674, line 9. This testimony

refers to acts or declarations of Dr. Fetter, Dr. Morgan, and the T.V.A. Committee, none of whom were named as Respondents in the complaint, and none of whom are shown by the evidence to have been connected with the conspiracy alleged in the complaint. If this testimony was admitted on the theory it related to acts or declarations of a co-conspirator, there is no showing that the acts and declarations referred to were in furtherance of the conspiracy alleged in the complaint, or in furtherance of any of its objects.

Page 17673, lines 11 to 22;

Page 17674, line 24, to page 17675, line 19;

Page 17675, line 21, to

Page 17677, line 3: This testimony refers to acts or declarations by or on behalf of persons not shown by
22177 the evidence to have been connected with the conspiracy alleged in the complaint.

The testimony was admitted on the theory that it refers to acts or declarations of a co-conspirator, whereas, there is no showing that the acts and declarations referred to were in furtherance of the alleged conspiracy, or any of its objects.

Further, the testimony set forth at page 17673, lines 11 to 22, inclusive, and at page 17675, line 21, to page 17677, line 3, refers to acts and declarations of totally unidentified persons.

22178 All of this testimony of Dr. Fetter set forth above by pages and lines refers to conferences and meetings during the N.I.R.A. period between certain of the Respondents and the Tennessee Valley Authority, an agency of the Federal Government, or to action taken pursuant to those conferences, meetings, and negotiations.

The conferences, meetings, and negotiations were had at the instigation of T.V.A. officials and with the knowledge and approval of the United States Government and the Federal Trade Commission.

There is no evidence that such conferences, meetings, and negotiations or any action taken by Respondents with respect thereto were a part or connected in any way with the conspiracy alleged in this complaint.

All of this testimony is, therefore, incompetent, irrelevant, and immaterial, and not connected with any of the issues in this case, not binding upon the Respondents and we, therefore, move at this time to strike it.

On behalf of each of the Respondents individually we

further move to strike certain pages and lines of the testimony of each of these witnesses on the ground that the testimony therein is based on exhibits which the Respondents have already moved to strike. The exhibits and the pages and lines based on them to which we refer are as follows:

22179 Dr. Duddy:

Ex. 2836: Page 15,323, line 15, to page 15,324, line 14. Page 15,329, line 13, to page 15,330, line 17.

Ex. 2837: Page 15,287, line 11, to page 15,292, line 10. Page 15,320, line 2, to page 15,323, line 14.

Ex. 2838: Page 15,324, line 15, to page 15,328, line 1.

Ex. 2839: Page 15,328, line 2, to page 15,329, line 7.

Dr. Hibbard:

Ex. 961i: Page 15,475, lines 8 to 23.

Ex. 1112: Page 15,464, line 5, to page 15,471, line 10. Page 15,597, lines 4 to 25.

Ex. 2161: Page 15,439, lines 7 to 19.

A-E: Page 15,475, line 24 to page 15,476, line 16.

Ex. 2839: Page 15,449, line 14, to page 15,463, line 1.

Dr. Viner:

Ex. 175A: Page 16,023, line 13, to page 16,024, line 22.

Ex. 1112: Page 15,669, line 5, to page 15,676, line 4.

Ex. 4185: Page 15,654, line 7, to page 15,657, line 7.

C-D:

Dr. Fetter:

Ex. 2921: Page 18,568, line 23 to 18,574, line 13.

All the testimony appearing in these pages and lines is incompetent, irrelevant, and immaterial, and not connected with any of the issues in the case, and not binding on any of the Respondents.

22180 We move at this time to strike the testimony of Professor Duddy which runs from page 15296, line 7, to page 15300, line 15, and from page 15309, line 14, to page 15315, line 11, and of Professor Viner which runs from page 16010, line 10, to 16021, line 12, and page 16031, lines 17 to 25, on the ground that the testimony at these pages and lines refer, respectively, to Commission's Exhibits 2841, 2844, and 2845, for identification, and to Commission's Exhibit 2846, for identification.

These documents were never admitted in evidence and

The testimony is, therefore, based on contents of documents which are not in evidence at the time we are making these motions. The testimony is, therefore, incompetent, irrelevant, and immaterial, and should be stricken.

We also move that all the testimony of Professor James M. Clark which refers to Exhibit 2920-A to G, for identification, which was never received in evidence, be stricken; all of Professor Clark's testimony which appears on page 18203 through 18209 of the record, as being based on exhibits not in evidence.

Mr. Wooden: Is that all of that particular motion, Mr. Leisure?

Mr. Leisure: Yes.

22181 Mr. Wooden: Your Honor, I want to lodge an objection to the motion as just made. Either Respondents made objections at the time the evidence was received, or they didn't.

If they made objections at the time, this is nothing but a repetition of those objections.

If they didn't make an objection at the time I submit the motion to strike at this late date is not timely.

22182 Trial Examiner Norwood: I think that the Counsel is right about that, but I am willing to let them present the motion and then I will tell them what I think about it.

Mr. Leisure: Thank you very much.

Now, in order to save time, instead of reading these in the courtroom, Your Honor, I am going to present motions to strike testimony with respect to the following witnesses, and I do not mean all of the testimony; I mean the designated lines that we have set out:

J. H. Ackerman
J. Allen
R. H. Armstrong
L. K. Astell
H. L. Baird
W. S. Barton
G. A. Beckett
W. Z. Betts
A. G. Billingsley
T. O. Bretherton
J. Brobston
T. T. Brown
J. P. Callaghan
B. F. Affleck
C. N. Apgar
Alex Ashley
Belle Bagley
H. W. Bangert
J. H. Bass
F. J. Bergin
H. P. Bickler
E. W. Blom
C. J. Brister
D. S. Browder
J. B. Cabanis
Elizabeth Carroll

	W. P. Cameron	W. W. Campbell
	L. J. Capen	E. Carmichael, Jr.
22183	G. D. Casto	W. D. Cloos
	Arthur Colegrove	A. C. Conkrite
	S. T. Crapo	H. S. Cree
	A. B. Custer	F. M. Dain
	J. L. Dankel	W. F. Dorsch
	J. Duffy	S. V. Duffy
	E. E. Duque	Elsie Eaves
	E. C. Eckel	J. L. Eysmans
	Major H. Feldman	W. H. Foley
	L. V. Fowley	W. B. Fry
	J. Fryer	C. H. Garity
	G. R. Gay	W. H. George
	C. A. Giblin	T. W. Glass
	J. A. Glessner	B. Glover
	J. Gottschalk	C. W. J. Grimmelman
	E. S. Gubernator	

If these may be presented as the motions on the exhibits that were presented, and be given an exhibit number, it will save time reading them, and going over them orally in the courtroom.

Trial Examiner Norwood: Mark them as Respondents' Exhibit 387.

(The document referred to was thereupon marked "Respondents' Exhibit 387," and received in evidence.)

Mr. Wooden: Can we get a copy of that?

22184 Mr. Brick: Yes.

Mr. Wooden: I want the record to show, your Honor—

Mr. Leisure: I now offer them in evidence with the same stipulation and understanding that Mr. Wooden and I entered into yesterday with regard to the motions addressed to the exhibit.

Trial Examiner Norwood: Yes. Well, they are not in evidence. They are received for the Docket and for the Counsel. They are identified. That is, they are received as identified only, and for the Docket.

Trial Examiner Norwood: If I have said anything to indicate that they are in evidence, why, I hereby reverse that ruling. They are not in evidence at all. They
22185 are marked for identification. They may go to the Docket as part of the record in this case, but they are in no sense evidence.

Mr. Leisure: Yes. Yesterday we stated when they became exhibits that they were in no sense to be considered as evidence.

Mr. Leisure: If your Honor pleases, the only point at issue, so far as I know, in my making this tender, is whether or not they be received as though orally made in the courtroom.

Trial Examiner Norwood: Yes.

Mr. Leisure: As I understand it, there is no dispute on that?

Trial Examiner Norwood: That is correct. Counsel used the words "received in evidence," and I wanted to be sure that I was understood on that.

22186 Mr. Leisure: I would like also at this time to make certain oral motions to strike the testimony, or parts of testimony, of the following witnesses in the record:

L. Hamlin
H. N. Hansen
H. E. Harman, Jr.
E. E. Hartley
W. R. Hackendorn
E. D. Hill
T. K. Holmes
E. J. Holway
A. H. Ingley
E. V. Johnson
C. M. Johnston
J. A. Keller
J. B. Large
22187 G. T. Lemmon
O. N. Lindahl
Y. E. McClendon
Robert E. McKean
J. E. McNair
D. H. MacFarland
R. J. Mahon
C. C. Merrill
W. T. Miller
A. E. Morgan
Barton W. Murray
D. P. Nicklin
J. C. O'Boyle
A. J. Hansen
W. E. Harkness
T. J. Harte
W. E. Hayghe
H. B. Henderlite
C. T. W. Hollister
W. Holmes
C. Horner
W. J. Jennings
F. R. Johnson
W. S. Jones
H. L. Knappenburger
J. A. Lehaney
W. H. Leonard
B. McClain
James McKeag
F. C. McKee
D. P. MacDonald
Everett MacIntyre
W. S. Mallory
H. Miller
R. F. Milwee, Jr.
Eugene Morris
J. F. Neylan
C. Nolte

Trial Examiner Norwood: Mark it as Respond-
22188 ents' Exhibit 388, and it is given the same status as Respondents' Exhibits 385, 386, and 387.

(The document referred to was thereupon marked "Respondents' Exhibit 388" and received in evidence.)

22189 I would like to move orally now to strike the testimony and the portions indicated of the following witnesses whose testimony appears in the record:

J. P. Parker	F. C. Parsons
T. K. Partridge	L. C. Paulson
C. J. Peoples	H. G. Phillips
F. Pickford	W. J. Plant
W. M. Pomeroy	J. W. Powers
B. H. Rader	F. V. Reagel
G. H. Reiter	H. H. Rice
H. B. Robeson	O. H. D. Rohwer
S. Rothbard	I. D. Royal
Phil Runion	J. J. Ryan
Ella Scott	J. D. Scovel
Arthur B. Shelby	J. P. Simpson
A. O. Stark	W. T. Starr
F. L. Stone	L. T. Sunderland
A. H. Tackett	P. I. Taylor
L. L. Thornhill	Gordon Tongue
J. F. Twamley	F. E. Tyler
R. L. Vance	Daniel J. Varady
W. D. Vogel	M. V. Ward
22190 H. O. Warner	G. E. Warren
W. A. Wecker	Hugh E. White
E. T. Widman	W. S. Wing
E. E. Woods	J. W. Wray

I ask that these be given a number, if your Honor please, with your Honor's permission.

Trial Examiner Norwood: Yes.

(The document referred to was thereupon marked "Respondents' Exhibit 389" and received in evidence.)

22194 Mr. Wooden: Your Honor, I didn't want to interrupt Mr. Leisure's statement.

Trial Examiner Norwood: Yes.

Mr. Wooden: But I want the record to show that I entered the same objection to Respondents' Exhibit 389, for identification, as I did to 387 and 388.

Trial Examiner Norwood: Yes.

Mr. Wooden: And on the same grounds.

Trial Examiner Norwood: Yes.

Mr. Clark: Your Honor, may it be understood that each and every one of the Respondents has the benefit of the motions made by Mr. Leisure on behalf of the clients that he represents on the record?

Trial Examiner Norwood: I think that is covered by our previous understanding.

We will have a five minute recess before the Counsel proceeds with his motions.

22195 Trial Examiner Norwood: Now, in order to prevent confusion in the Docket, I shall ask the Reporter to erase that receipt stamp from Respondents' Exhibits 385 and 386, and I will state now that with respect to those two, and Respondents' Exhibits 387, 388, and 389, that they are to be considered as marked for identification to be filed in the Docket as original motions made at the time that they are presented.

Mr. Leisure: Made as if on the record; that is all we want.

Trial Examiner Norwood: Yes, that will prevent confusion down there.

Mr. Leisure: And they are on the record?

Trial Examiner Norwood: Yes.

Mr. Clark: May I proceed, your Honor?

Trial Examiner Norwood: Go ahead.

Mr. Clark: On behalf of the Calaveras, Pacific Portland, the Santa Cruz, and the Yosemite Respondents, and also on behalf of the California Portland and the Riverside companies, I now adopt the motion made by Mr. Leisure and each one of those—I adopt the motion made by Mr. Leisure at page 22148, beginning with line 20 of the record, and ending with line 7, page 22160, and object—this motion will have to be in the alternative, if the Court please—

22196 object to the testimony specified by Mr. Leisure in that motion upon each of the grounds, severally, there stated by him, and if that objection be overruled I move to strike the same testimony as specified by Mr. Leisure in the portions of the transcript that I have indicated on each of the grounds, severally, that he stated there, and, further, if that motion be denied I move in the alternative to limit each and every specified item of that testimony at the pages and lines that I have indicated so that they will not apply to any of the Respondents that are named as being represented by me.

Now, may it be understood that the Respondents may each, severally, have the benefit of the motions that I have just made?

Mr. Shefelman: On the part of the Northwestern Portland Cement Company.—

Mr. Wooden: Your Honor, may I say, there, that there is no objection on my part to each Respondent having the benefit, such as the benefit is, of Mr. Clark's motion, but I wish to point out that Mr. Clark is now including in his motion many things which he has no right to include under the terms of the stipulation regarding deferred cross-examination; that he was not given the right by any such stipulation to come in here more than a year later and move to strike a lot of things that have no relation to that deferred cross-examination, or to that stipulation,
22197 or—

Mr. Clark: May we have the stipulation, if the Court please?

Trial Examiner Norwood: Yes.

Mr. Clark: My understanding of the stipulation is this: "Third; at any time prior to the offering of its defense testimony, if any, each Respondent shall have the right to make such objections or motions directed to or against any of the evidence theretofore introduced in so far as it might or might not relate to that Respondent, without prejudice on account of any previous ruling thereon, while Respondents' Counsel was not present."

Mr. Wooden: It looks as though I were wrong.

Mr. Clark: I think so, Mr. Wooden.

Trial Examiner Norwood: State your motion.

Mr. Shefelman: I had just started to ask the Court's leave to adopt the motions just made, on behalf of Northwestern Portland Cement Company, and to join in them.

22198 I believe your Honor had not yet answered Mr. Clark's question, when I arose. His inquiry was to permit him to adopt the motions as being made on behalf of each of the Respondents, individually, and I judge that should be answered.

Trial Examiner Norwood: He doesn't need any permission on my part to adopt those motions. I thought Mr. Wooden replied to the other part of it.

Mr. Clark: My understanding is Mr. Wooden stated that there was no objection of having the benefit, whatever it may be worth, as he put it, to the motions just made.

Mr. Little: I merely want to add, your Honor, I will join, when the proper time comes, in motions made by Mr. Leisure and Mr. Clark, but I have certain specific motions to make when Mr. Clark is through, so I will adopt those and add to them at that time.

Mr. Clark: In addition, on behalf of the six companies whose names I mentioned, and on behalf of each of them, severally, I now adopt and urge each and every motion to strike that Mr. Leisure has urged upon the grounds, severally and separately, that he has stated.

I would like the same understanding with respect to that. Is that satisfactory, Mr. Wooden?

Mr. Wooden: That is satisfactory to me.

22199 Mr. Shefelman: We join in that, likewise.

Mr. Little: So do we.

Trial Examiner Norwood: How about Marquette?

Mr. Zimmerman: Yes; and as I understood, that covers all the Respondents.

Trial Examiner Norwood: Yes, I think it is amply covered without any further safeguards.

Mr. Zimmerman: That you understand, Mr. Wooden, it covers all of the Respondents?

Mr. Wooden: Yes. I thought we had that understanding at the outset of the case.

Any motions made on behalf of any one Respondent might inure to the benefit of the others.

Mr. MacIntyre: That is, inasmuch as any motion or objection had any benefit, it would inure to all.

Trial Examiner Norwood: You mean, if any.

Mr. MacIntyre: Yes.

Mr. Clark: And if I might express it technically, to each, severally.

This is a formidable looking document and I shall not read it, but it is under the specifically reserved right to the Pacific Coast Respondents I urge this now, and it is on behalf of the Santa Cruz Portland Cement Company, the Calaveras Portland Cement Company, Yosemite Portland Cement Company, Pacific Portland Cement Company, and each of them, severally.

22200 Comes now each of the undersigned Respondents, severally, each of whose principal place of business now is and always has been more than 2,000 miles distance from Washington, D. C., by any airline, pursuant to that certain stipulation set forth in the Reporters' transcript of

the above-entitled proceeding at pages 340 to 344, inclusive, and which was approved by the Trial Examiner herein; and, each of said Respondents, for itself and severally, and none of said Respondents acting for any of the others, or jointly with any of the others, hereby objects to certain evidence offered and received herein when this objecting Respondent was neither present nor represented by Counsel, as follows:

(a) Objects separately to each exhibit designated in Schedule "A" attached hereto (which said Schedule "A" is hereby incorporated in and made a part hereof by reference to the same extent and with the some effect as though fully set forth herein on the ground that each one respectively of said designated exhibits is irrelevant and does not tend to prove any fact relevant to any issue in this proceeding so far as this proceeding relates to this objecting Respondent.

May I interpolate there? I would like consent to add to that schedule the exhibits which were admitted yesterday and which were not available to us until
22201 yesterday, and haven't been, since, as a matter of fact?

Is that satisfactory, Mr. Wooden?

Mr. Wooden: Yes.

Mr. Clark (Continuing): —also to each separately of said designated exhibits on the ground that each one respectively of said exhibits is immaterial so far as this proceeding relates to this objecting Respondent; also, to each separately of said designated exhibits on the ground that each one respectively of said exhibits is hearsay and incompetent as to and has not been connected with this objecting Respondent. Each of said objections is made seprately to each of said designated exhibits, and separately and severally by each of these objecting Respondents, with the same force and effect as though repeated and set forth at length separately herein for each separate individual exhibit and separately for each objecting Respondent.

So much for the exhibits.

Each of the objecting Respondents objects separately to each portion of oral testimony set forth in the Reporters' transcript herein which is designated in Schedule "B" attached hereto (which said Schedule "B" is hereby incorporated in and made a part hereof by reference as to the same extent and with the same effect as though fully

set forth herein on the ground that each one
22202 respectively of said designated portions of oral testimony is irrelevant and does not tend to prove any fact relevant to any issue in this proceeding so far as this proceeding relates to this objecting Respondent; also to each separately of said designated portions of oral testimony on the ground that each one respectively of said portions of oral testimony is immaterial so far as this proceeding relates to this objecting Respondent; also, to each separately of said designated portions of oral testimony on the ground that each one respectively of said portions of oral testimony is hearsay and incompetent as to this objecting Respondent; and, further, to each separately of Item 54, Item 364, the portion of Item 357 which appears in lines 9, 10, and 11, at page 2298, the portion of said Item 368 appearing in lines 14 to 25 on page 2363, and on page 2364, and the portion of said item 507 appearing at page 5384, all in said Schedule "B," on the grounds that each thereof is incompetent because it is hearsay, and, separately, on the grounds that each thereof is incompetent in that it is a statement made by a witness of the tenor of voluminous records without making the said records available to this Respondent.

Each of said objections is made severally by each of these objecting Respondents and separately to each and
separate questions propounded to each witness des-
22203 ignated in schedule "B" and included within those portions of the Reporter's transcript designated in schedule "B."

I might wait there just a minute. Do you want to follow this at the present time? I am reading from page 4.

And separately to each separate answer and to all of the testimony of each such designated witness within the same designated portions of the Reporter's transcript, with the same force and effect as though repeated and set forth at length separately—

Trial Examiner Norwood: Do you mean by that that you think that this stipulation would give you the benefit of an objection having been made to each and every question contained in this entire record?

Mr. Clark: I have no doubt of it, Your Honor.

Trial Examiner Norwood: What?

Mr. Clark: I have no doubt of it.

Trial Examiner Norwood: Go ahead.

Mr. Clark: In my own mind. —with the same force and effect—

Mr. Wooden: Pardon me. Under the arrangement stated just a few minutes ago, I had supposed that any objections made throughout the course of the hearing by Mr. Leisure for the benefit of his Respondents would inure to the benefit of Mr. Clark's clients. Now, Mr. Clark is merely repeating that.

22204 Mr. Clark: Well, I don't know—

Trial Examiner Norwood: He urges that every question in this entire record is deemed to have been objected to by you, and, therefore, inures to the benefit of the companies whose counsel were present at the hearing? Do you think that that is covered?

Mr. MacIntyre: That is the effect, Your Honor.

Trial Examiner Norwood: Is covered by this stipulation?

Mr. Clark: Later on we adopt them and make them as our own.

Trial Examiner Norwood: Don't you think that is absurd?

Mr. Clark: I don't know about that. I am trying to take the record as I find it. That is my understanding of the record, even if the record is absurd.

—with the same force and effect as though repeated and set forth at length separately herein for each separate question so designated and for each separate designated portion of oral testimony.

22205 Now, may it be understood that Schedule A has been read? It consists of 20 pages of exhibits, and if it may be understood that it has been read as a part of the motions that I am making, then I shan't take the time to read it, but I will file it as the others have been filed.

Trial Examiner Norwood: Yes.

Mr. Clark: May we have that understanding?

Trial Examiner Norwood: It may be so understood, yes.

Mr. Clark: And also that Schedule B, consisting of 794 items within 142 pages has also been read in extenso and formally made a part of the motions? If we may have that understanding, I will not pause to read Schedule B. May we have that understanding, Your Honor?

Mr. MacIntyre: May we hear the question?

Mr. Wooden: I am sorry. I didn't get that.

Mr. Clark: I merely asked, if I may explain, that Schedule A and Schedule B be deemed to have been read.

Trial Examiner Norwood: Yes.

Mr. Wooden: Oh, yes.

Mr. Clark: That is all.

(Thereupon a certain document was marked as Respondents' Exhibit No. 390, and received in evidence.)

22206 Mr. Wooden: I would like to raise this question: In any statement I may have made, I did not intend that Mr. Clark's objections now made for the first time in this proceeding should inure to the benefit of Respondents' Counsel who were present throughout the whole case hitherto and have had the benefit of their objections and the opportunity to object at that time. Now, there may have been, and I think there are, exhibits in this record that were received without objection, or by stipulation, and if Mr. Clark's objections are now going to have the effect of reaching back and giving his objections, or giving the benefit of his objections to Respondents' Counsel who stipulated or agreed that certain exhibits might be received, why, I think that is carrying it really to an absurd degree.

Mr. MacIntyre: There can be no agreement on such a proposition as that by Commission's Counsel, and if anything in this record heretofore has been taken to be deemed an agreement to that effect by any of the Respondents' Counsel, it is hereby and now withdrawn.

Mr. Zimmerman: May I be heard on that for just a moment? Will you excuse me, Mr. Clark, for just a moment?

Mr. Clark: Surely.

22207 Mr. Zimmerman: It would not be possible, of course, to restore the parties to the positions that they were in prior to the agreement which Mr. MacIntyre now attempts to withdraw, relying upon all of the agreements and stipulations that were made. I must remind Mr. MacIntyre, if I may remind Your Honor, that early in these proceedings there was an agreement that objections might be made at any time by any Respondent prior to the time when they put in their defense.

Trial Examiner Norwood: I don't recall that.

Mr. Paulson: I think not.

Trial Examiner Norwood: The agreement was that ex-

ceptions may be deemed to have been taken at the proper time to any adverse ruling.

Mr. Zimmerman: May I suggest this, that so far as I understand the practice here, there is no practice of noting an objection to an adverse ruling. That is not necessary; that is not the practice.

Trial Examiner Norwood: Exception, not objection.

22208 Mr. Zimmerman: But be that as it may, I merely want to say that whatever the record shows with reference to any agreement, we had a right to rely upon it, whatever it was, and there is no possibility of it being withdrawn now and restoring the parties to their positions prior.

Trial Examiner Norwood: I think the Counsel is right about that, yes.

Mr. Zimmerman: Now, to the extent that we should have the advantage of these objections, and can take an advantage of these objections, I can see no reason why Counsel for the Commission should hesitate in agreeing that whatever Mr. Clark says in the way of objections and motions to strike are said as well on behalf of all other Respondents.

Mr. MacIntyre: That is just exactly what I said, that there is no agreement on, Mr. Zimmerman.

Mr. Zimmerman: Well, certainly, we can agree now, can't we, that whatever Mr. Clark says in urging objections and motions to strike may be considered as said by counsel for each and every other Respondent? Now, as to the effectiveness of what they would say under those circumstances, I do not address myself. I merely say that to save time it may be considered that he is speaking with the voice of all the Respondents.

Mr. MacIntyre: That is a different proposition
22209 entirely.

Mr. Paulson: If Your Honor please—

Trial Examiner Norwood: Will you kindly let me see that original agreement that you are referring to there?

Mr. Clark: The stipulation, if the Court please?

Trial Examiner Norwood: Yes.

Mr. Clark: I had it here.

Mr. Wooden: I would like to see it, myself.

Mr. Zimmerman: Well, that much is agreed to, isn't it, as I have now stated it?

Mr. Wooden: He can speak on behalf of anybody he likes.

Mr. Zimmerman: With one voice he may speak for all.

Trial Examiner Norwood: I don't agree to anything like that. You can speak for yourself.

Mr. Paulson: If Your Honor please—

Mr. Shefelman: Well, will your—

Mr. Paulson: I think there is one other point in this matter: Granted that the stipulation does permit Counsel to make his objections at some later date than when the testimony or the exhibits were offered, that still doesn't give him the privilege of making it after the closing of the plaintiff's case, and these objections are now being urged after the Government has rested. That is an altogether different objection than that he made those objec-
22210 tions timely. They are certainly not timely under the stipulation as Mr. Clark urges, because the Government has now rested and we are now hearing the objections. In other words, we would have no chance to correct those objections, meet them, as it stands now. That would be a definite unfairness.

Mr. MacIntyre: On that point, I would like to point out a sample of unfairness on that procedure, just this: Back in February, 1938, I have in mind an exhibit that was admitted in evidence. It is an important exhibit in this case of several pages.

Mr. Withrow: Which exhibit, Mr. MacIntyre?

Mr. MacIntyre: It wasn't identified by any witness that was on the stand at that time, but Mr. Leisure and Counsel present waived any objection to identification. It is a very important cog in this case. Now, for it to be said that there is any legal effect to any objection that is raised here after the Commission has closed its case, calling witnesses, by which it could have back then, subsequent to February, 1938, thoroughly identified that document, would most certainly be the most unfair practice that could have been imposed upon bringing the truth into the record.

Mr. Leisure: What document is that, Mr. MacIntyre?

Mr. MacIntyre. It is only one of many, but I
22211 have one in mind, one in a series of 547 produced under subpoena duces tecum by M. C. Monday.

Trial Examiner Norwood: I don't think that any agreement here has been made that would paralyze our entire procedure in any such a manner.

Mr. MacIntyre: That is exactly what it would do if it was granted as it has been asked.

Mr. Zimmerman: If the Examiner please—

Trial Examiner Norwood: Now, let's not have any more discussion until I read that agreement.

Mr. Clark: May I, before I hand Your Honor the stipulation, call attention to one thing in response to something that Mr. Paulson said? The third paragraph says in plain terms: "At any time prior to the offering of the defense testimony, if any."

Trial Examiner Norwood: Yes, I understand that.

(A paperwriting was handed to the Trial Examiner.)

Trial Examiner Norwood: This isn't the record.

Mr. Little: No, that isn't the record. That was taken from my own notes, Your Honor. It is on page 340 to 343 or 344.

Mr. Paulson: Well, of course, that calls for a matter of construction, and I think that the proper construction on that would be one which would tend towards fairness, and the only way that would tend towards fairness would
22212 be the one that I suggested, that the objections be made prior to the closing of the Government's case. That falls immediately upon discussion by the fact that Mr. Clark sought to cross-examine the Government's witnesses upon the generalizations which they made, and in response to Mr. Wooden's objection, I remember there was an objection interposed as to cross-examination on those generalizations, because there wasn't any objection to the witness testifying when he was on the stand, and it goes to the rights of Mr. Clark and the other Respondents' Counsel in getting the material which they called for. I think, therefore, we need to arrive at a definite interpretation of that stipulation.

Trial Examiner Norwood: This stipulation doesn't mean that you shall have objections to questions, or to any evidence that has been received without objection where there were Counsel present. No, I shouldn't consider that for an instant.

Mr. Clark: If the point that Counsel makes has the correct meaning—

Mr. Zimmerman: May I complete my statement, if the Examiner please?

Trial Examiner Norwood: Yes.

Mr. Zimmerman: I am not attempting now to change or

alter in the slightest degree anything that the record
22213 shows about any prior agreement. On the contrary,
I am merely standing upon the state of the record, whatever it may be. Mr. MacIntyre, in a sense, really was arguing the question as to whether an objection should be sustained or not to a certain matter. All I am saying is that whatever the record shows, it stands, but that rather than have each Respondents' Counsel now stand up and repeat whatever is said by Mr. Clark or Mr. Leisure in the way of objections, and in the way of motions to strike, that it merely be considered that whatever they do say, and whatever motions they do make, shall be considered as if made by each and every Respondent.

Mr. MacIntyre: As if made at this time.

Mr. Zimmerman: Yes, quite so.

Mr. MacIntyre: Yes.

Mr. Zimmerman: I am not attempting to alter or change it in any degree whatever; I am merely trying to save time and say one voice speaks for all.

Trial Examiner Norwood: If an objection was made to a question, then each Respondent would have the advantage of that.

Mr. Zimmerman: Quite so.

Trial Examiner Norwood: And after this deferred cross-examination, the Pacific Coast Respondents, for whose benefit this stipulation was entered into, could have the
22214 right of making any motions or objections that could properly be considered at that time, not as if you would have been present and could make objections to every question that was asked, or make objections to exhibits that were received by consent. You can move to strike them on legal grounds.

Mr. Clark: Of course, there is a motion to strike attached here, if the Court please.

Trial Examiner Norwood: Yes.

Mr. Clark: May I proceed?

Trial Examiner Norwood: Yes.

Mr. Clark: Now, each of the Respondents, and severally, adopts and makes on its own behalf separately each and every objection made to the admissibility of testimony or exhibits and each and every motion directed against any testimony or exhibits received in evidence, made by or on behalf of any other Respondent or Respondents in this proceeding. That is merely an express adoption of what I

understand the understanding is. Anyway, each of said objections and motions is adopted and made separately with the same force and effect as though each Respondent joining herein had been personally present at the time when each such respective objection or motion was made by or on behalf of any other Respondent or Respondents
22215 and had personally joined in such objection or motion at the time when made.

Now, each objects to and moves to strike from the record herein all evidence received herein on the ground severally (1) that neither the whole nor any part thereof tends to prove that this objecting and moving Respondent ever at any time entered into any agreement or combination or conspiracy, either express or implied, of any kind or nature whatsoever, with any other Respondent or Respondents herein, or with any other person or persons whomsoever, to fix prices, or to lessen competition or to create a monopoly or to restrain trade, or that said Respondent, acting either individually or in combination with any other Respondent or Respondents herein, or with any other person or persons whomsoever, has ever at any time used any unfair method of competition or unfair or deceptive act or practice in commerce, either as alleged in the complaint on file herein, or otherwise, or at all; (2) That neither the whole nor any part thereof tends to show that this proceeding is based on or involves public interest, or is in the interest of the public; and (3) that neither the whole nor any part thereof tends to prove that all or any of the practices alleged or described in the complaint on file herein now have or ever had any tendency to injuriously affect the business of any competitor or competitors of this objecting and moving Re-
22216 spondent.

Now, as to each of the objections hereinbefore specified which shall be overruled by the Trial Examiner herein, or by the Federal Trade Commission, this objecting Respondent for itself and severally, and not for any of the other Respondents or acting jointly with any of the other Respondents, hereby moves that the purpose, use, effect, and admissibility of such evidence received herein over any and each of said objections be limited so that all and any such evidence shall be deemed admitted solely and only against Respondents other than this objecting Respondent. Each said motion is made severally and separately by this moving Respondent as to each separate ex-

hibit or portion of oral testimony herein designated in Schedules "A" and "B".

Each of the foregoing objections and motions is made separately as to each separate count in the complaint, and is also made separately as to the complaint in its entirety, with such force and effect that the relevance, materiality, competence, and admissibility of all evidence herein referred to may be ruled upon separately as to each separate count and as to the complaint as a whole.

Now, if the record shows that I have already handed to Mr. Wooden a copy of schedules "A" and "B," and if I may have this marked, for identification, with the
22217 same understanding that Your Honor expressed with reference to Mr. Leisure's—

Trial Examiner Norwood: I understand that entire motion is in writing, is it?

Mr. Clark: The entire motion is in writing.

Trial Examiner Norwood: It has been marked, and it may be transmitted to the Docket to be filed as a motion in this case.

Mr. Clark: Now, if the Court please, if I may proceed, there are just two or three more, and this will be even shorter.

Within the rights granted and reserved by the stipulation—

Trial Examiner Norwood: Off the record just a minute. Couldn't Counsel just file those?

Mr. Clark: I am going to merely state what it is, and that is what I am going to do.

Trial Examiner Norwood: All right.

Mr. Clark: Within the provisions of the stipulation, and under the privileges there granted on behalf of O'Melveny, Fuller and Myers, attorneys for the Riverside Portland Cement Company in this proceeding, I now make the objections and motions as follows:

Now, if the Court please, I would like the record to show that the objections and motions have been read in
22218 extenso, together with the schedules attached, and I shall give Counsel a copy of this.

Trial Examiner Norwood: Yes.

Mr. Clark: For his use, and if that may be the understanding I will not pause to read any of these documents, if the record may show that they have been read in extenso.

Trial Examiner Norwood: They may be marked.

Mr. MacIntyre: And will be found in Respondents' Exhibits marked, for identification—

Trial Examiner Norwood: 391, and filed with the Docket as if made orally at this time.

(RESP. EX. 391 was offered and received in evidence.)

Mr. Clark: Yes, sir; and I am handing for the Commission a copy.

(A copy of the exhibit referred to was handed to Mr. Wooden by Mr. Clark.)

Mr. Clark: I have one more for Call, Murphey, Davis and Graves, attorneys for Respondent California Portland Cement Company. This being very brief, I am going to ask leave of the Court to read it in extenso, under the stipulation.

Respondent California Portland Cement Company, whose principal place of business is more than 2,000 miles
22219 distant from Washington, D. C., by any air line, pursuant to the stipulation set forth in Reporter's Transcript at pages 340 to 344, inclusive, approved by the Trial Examiner, objects to evidence offered and received herein when Respondent was neither present nor represented by counsel, and joins in the objections, and each and all of the objections, made by and stated in the objections filed herein on behalf of Respondent Santa Cruz Portland Cement Company and other Respondents.

Respondent makes motions to strike evidence, testimony, and exhibits, and joins in the motions to strike made by and stated in the motions filed herein on behalf of Respondent Santa Cruz Portland Cement Company and other Respondents.

The objections and motions filed herein on behalf of Respondent Santa Cruz Portland Cement Company and other Respondents, the statements of the grounds of objections and of the grounds and bases for the motions as stated therein, and the exhibits attached thereto, are hereby referred to, adopted, and made a part hereof as if set forth herein in full.

I think that is all, Your Honor.

Trial Examiner Norwood: I will defer the ruling on all of these until after I have examined the documents.

Mr. Little: If Your Honor please, I have certain
22220 objections and motions to make on behalf of the Superior Portland Cement, Inc., and I now hand to

the Reporter written objections and motions, together with Schedule "A" and "B," Schedule "A" being the list of the exhibits which we are asking to have stricken, and Schedule "B" being a list of the testimony by page numbers, which we think Your Honor should strike, and I will ask to have that marked, for identification, under the same understanding that the schedules and motions of Mr. Leisure and Mr. Clark were marked.

Trial Examiner Norwood: Yes, and deemed to have been made orally at this time.

Mr. Little: Yes, Your Honor.

Trial Examiner Norwood: Mark it 392, for identification.

(RESP. EX. 392 was offered and received in evidence.)

Mr. Little: I am handing a copy of Respondents' Exhibit 392, for identification, to Mr. Wooden.

(A copy of Respondents' Exhibit 392 was handed to Mr. Wooden by Mr. Little.)

Mr. Little: If Your Honor please, I would like, if Your Honor would bear with me for a few minutes, because I wish to call Your Honor's special attention, first, to the objections and the motions which are quite brief but
22221 somewhat different from the other objections and motions which have been made. Furthermore, I wish to point out to Your Honor specific pages of Schedule "A" and Schedule "B," which I wish to argue at reasonable length to Your Honor, either now or following the recess.

Trial Examiner Norwood: I don't think we should argue any of these motions. They are voluminous motions, and they are all written out.

Mr. Little: Will Your Honor bear with me for a moment?

Trial Examiner Norwood: I shouldn't let you argue on the record with regard to them. You can make a terse statement about them, and that is enough.

Mr. Little: If Your Honor please, I wish Your Honor would hear me on that point for just one minute.

Trial Examiner Norwood: Yes.

Mr. Little: Last night I read over the record of the delayed cross-examination, and my best judgment is that I consumed approximately two and a half to three hours' time on the delayed cross-examination and statements to Your Honor and objections all told. I now feel, partic-

larly in view of the fact that the stipulation contemplates that Your Honor that we are without prejudice as to any previous ruling or any motion which Your Honor may have gathered after taking the 20,000 pages of testi-
22222 mony in this case—I assume Your Honor's mind is open on it, and that Your Honor will hear me briefly as I point out particular features about the testimony and the exhibits in this case which I think do not relate at all to the Respondents whom I represent.

Furthermore, I think that we are entitled to a hearing on this point. Your Honor has indicated several times during the hearing that no evidence would be considered against another Respondent unless it was connected up. Now, having come nearly 3,000 miles at considerable expense to my client, and having spent many days in this hearing room when matters not affecting my client were being discussed, I think Your Honor should bear with me while I explain why I think certain of my motions are particularly important and should be granted, and I am making these, if Your Honor please, in the form, first, of objections on the theory that if a certain question was asked of a witness which has no relation to my client, but if inferences may be drawn from an answer to that question which counsel might seek to use in a case of this kind on the theory of conspiracy, then I assume Your Honor will hear me on the objection to that question, particularly if I am not wasting the time of the Court with frivolous matters.

Trial Examiner Norwood: Now, the proper place
22223 to be heard about that is before the Commission. They can give you a hearing on that, but the Counsel may make a brief statement as to these points. Have you marked your motion now?

Mr. Little: I prefer to do it in my own way, if Your Honor please. There are certain pages which I wish to call Your Honor's attention to.

Trial Examiner Norwood: I say, have you had that marked for identification?

Mr. Little: I have, Your Honor, yes. I think the number is 392.

Trial Examiner Norwood: Go ahead.

Mr. Little: I want to take exception to Your Honor's statement that the proper place to do this is before the Commission, because this is a hearing on the evidence.

itself, and if we had been in the courtroom we would have been permitted to make objections, and Your Honor would have ruled in the light of the situation as it affects my Respondent, and being a separate Respondent, and having a separate right to object, I expect that Your Honor would rule on it in that way.

Trial Examiner Norwood: Well, the Commission reviews all of my rulings and there is the place to do your arguing.

Mr. Little: But, Your Honor, I want to urge this,
22224 and I want to urge it very seriously, because it is a very important point involving our defense.

Trial Examiner Norwood: I told you I would hear you. Go ahead.

Mr. Little: I hope Your Honor has no preconceived notion, because if Your Honor has, it really means that you are assuming that all the evidence in this case, whether connected up or not, should be considered binding against my Respondent. Now, if that is Your Honor's position, it is highly prejudicial to a company from the Pacific Coast which claims that it is only slightly involved, if at all, and I deny it is involved to any extent within the charges. I would also deny that other Respondents are, but I have no special knowledge of other Respondents, but I have the right now to have a full and complete hearing from Your Honor on my claim that the testimony, questions asked of certain witnesses, were entirely immaterial as far as my client is concerned.

I am not going to take Your Honor's time, or Counsel's time here to argue with reference to each of them set forth in the schedule, but I am going to set forth certain typical characteristic instances which are important enough so that I hope Your Honor will take them under special consideration and not just simply say that he will deny all motions on the ground that one is in the same category as another.

22225 Trial Examiner Norwood: Now you know justice is a clear pool in which every man sees his own reflection so if I were prejudiced I probably wouldn't think that I was.

Mr. Little: That is correct, Your Honor.

Trial Examiner Norwood: I shall make no statement as to whether or not I have any preconceived opinions on this. I try to keep my mind open.

Now if the Counsel will go ahead and make his statement as to these points; we have already agreed he should be permitted to do it.

Mr. Little: Thank you, Your Honor.

Trial Examiner Norwood: And you are directing your remarks, now, to Respondents' Exhibit, for identification, 392.

Mr. Little: Yes, Your Honor.

In the first place I want to call Your Honor's attention—

Mr. MacIntyre: Off the record. That is 391. We don't have a 392.

Mr. Little: I think that is correct. Your Honor said 392 once and I repeated it.

Mr. Withrow: It is 392, Your Honor.

Mr. Wooden: Yes, Riverside is 391.

Trial Examiner Norwood: Go ahead.

22226 Mr. Little: Yes, sir. The first general class of testimony to which I want to call Your Honor's attention is the testimony of the economists commencing with Dr. Duddy.

Your Honor will remember that practically all of the testimony and I think all of the testimony after reading the record of these witnesses, is based upon assumptions in hypothetical questions.

Let me first call Your Honor's attention to the hypothetical question which was asked of Dr. Duddy, and I want Your Honor to have in mind, as I necessarily must have in mind, the situation of my Respondent. I think that is the only looking glass through which you can attempt to perceive the materiality or propriety of this question.

I am reading from page 15269:

"Q. Now, Dr. Duddy, assuming for the purpose of the question that cement is quoted and sold only at delivered prices and that the cement mills or producers do not quote and sell f.o.b. mill;—" I will come back to that in a moment, "—assume that there are some cement mills and groups of cement mills that are basing points and other mills are non-basing points;—", and I emphasize that, "—assume that the delivered prices of cement are the equivalent of basing point price plus rail freight

22227 from the basing point to destination and that non-basing point mills match the delivered prices of the

basing point mill; assume further that the lowest combination of the base price plus rail freight determines which basing point price will govern particular destinations and that when delivered prices are made in that way the delivered prices of all mills become identical at the same destination; assume that on shipments of cement the freight is ordinarily paid by the buyer, that it is deducted from the face of the invoice, and that the balance is then paid to the seller; assume also that the mill net prices of each non-basing point mill vary among its respective customers, depending on the differences in freight to their respective destinations, substantially higher mill nets being received from its nearby customers than from its more distant customers;—"

Mr. Wooden: Does the record show "non-basing" there?

Mr. Little: You may refer to the testimony.

"—assume further that when selling for delivery at destinations governed by other basing point mills the mill net prices of each basing point mill also vary between its respective customers, depending on the differences in freight to their respective destinations, substantially higher mill nets being received from some customers in territory governed by it than by some customers in the territory governed by other basing point mills; take all of those factors into consideration and then tell us if there is anything like that in the marketing of any agricultural product that you know of."

I want to read another hypothetical question because it is different and partly because I want to point out a question which was subsequently asked of Dr. Viner by Mr. Zimmerman on cross-examination.

I am reading from the manuscript at record pages 15621 and 15622.

"Q. Now, Dr. Viner, I am going to put to you a question which will assume certain facts to exist in the pricing of cement and then I will follow it with a question.

"Assume that there is a general practice in the cement industry of mills quoting and selling only at delivered prices and of refusing to quote and sell f.o.b. mills; assume that some mills and some groups or clusters of mills are basing points and that some other mills are non-basing points; assume that delivered prices are the equivalent of base point price plus rail freight from base point to des-

tination and that the lowest combination of base price plus rail freight determine which base point price
22229 will govern at any particular destination;" I won't continue to read the balance of the question. I think it is generally familiar to Your Honor, but the first three clauses of the question where the ones which I wished particularly to call Your Honor's attention to as well as this clause:

"—assume that the mill nets of each non-basing point mill vary between its respective customers depending on the differences in freight to their respective destinations, higher mill nets being received from its near by customers than from its more distant customers;—"

As to Dr. Viner, he testified that "the assumption of frequent f.o.b. mill sales would have affected it very importantly", meaning his answer to the hypothetical question, "if these very frequent sales were available to all buyers regardless of their location."

Then Mr. Zimmerman asked this question:

"Q. Let us assume that they are available to all buyers who ask for them. Would that change the meaning?"

"A. Very substantially."

I have been reading from transcript page 15896.

Now Dr. Fetter's question was still somewhat different and I desire to read all of these because it points up to the very thing which is most prejudicial to my particular respondent and I don't doubt that it is very preju-
22230 dicial to other respondents who may be similarly or substantially situated.

Dr. Fetter was asked this; it was one of the last, if not the last, hypothetical question asked, and I assume, therefore, it was prepared with even greater care than the others and I now read from transcript page 17639:

"Q. Assume that there is a general practice in the cement industry of mills quoting and selling only at delivered prices and of refusing to quote and sell f.o.b. mill.

"Assume that some mills and some groups or clusters of mills are basing points and that some other mills are non-basing points.

"Assume that delivered prices are the equivalent of base-point prices plus rail freight from base-point to destination and that the lowest combination of base price plus rail freight—" and I want to emphasize this, parenthetically emphasize rail freight in view of the testimony in

the Pacific northwest with reference to water compelled rates, trucking rates into Yakima, and southeastern Washington, and into many places, "—that the lowest combination of base price plus rail freight determines which base-point price will govern at any particular destination."

22231 And then again, down to "assume that the mill nets of each non-basing point mill vary between its respective customers—" that was somewhat similar to the question asked of Dr. Viner, "—assume, also, that substantial shipments are being regularly made by basing-point mills into the territory governed by other basing points.

"Take all of those things together and then tell us whether or not, in your opinion, that corresponds to any sort of competitive method of pricing with which you have become familiar in the course of your study and experience."

Now I assume that when Your Honor permitted that question to be answered it was on the theory that there was testimony or would be testimony in the case and I think probably I should emphasize the latter, that there was an assumption that there would be testimony in the case to show that those facts would obtain in the cement industry and if Your Honor, in permitting that question to be answered, intended it to apply to all Respondents, then I assume that Your Honor would be anxious to hear the facts clearly stated as to whether those conditions did obtain as to each Respondent if each Respondent is to be entitled to a fair and adequate and complete hearing in Court.

Trial Examiner Norwood: That is what this
22232 whole inquiry is about.

Mr. Little: That is correct, Your Honor.

Trial Examiner Norwood: And if it applies to any of the Respondents and if so, whom, and how many.

22233 Mr. Little: Now, if Your Honor please, in view of a statement made just following the adjournment, I would like to make it quite clear as to the nature of the objections and the motions which I am making at this time, and so I will read a very brief statement which constitutes the objections and motions of the Superior Portland Cement, Inc., which is Respondents' Exhibit 392.

"Comes now Superior Portland Cement, Inc., a corporation, whose principal place of business now is and at all

times has been more than 2,000 miles distant from Washington, D. C., by any air line, one of the Respondents in the above proceeding, through its attorneys Little and Leader, successors to Stratton, Leader, Little and Stratton, attorneys of record herein, pursuant to the stipulation made and entered into on the 2d day of December, 1937, and set forth in full in the Reporters' transcript at pages 340 to 344, inclusive, which said stipulation was approved by the Trial Examiner herein, and without waiving, but, on the contrary, expressly preserving its objection to the jurisdiction of the Federal Trade Commission as against this Respondent hereby objects to certain evidence offered and received herein when this objecting Respondent was neither present nor represented by Counsel
22234 as follows:

"(1) This Respondent objects separately to each of the exhibits listed in the attached Schedule 'A', which Schedule 'A' is hereby incorporated and made a part hereof by reference thereto to the same extent and with the same effect as though fully set forth herein, on the ground that each of said exhibits is irrelevant and immaterial and does not tend to prove any fact which is relevant or material to any issue in this proceeding so far as this proceeding—"

Trial Examiner Norwood: Was your client represented by counsel in your absence here?

Mr. Little: I beg your pardon?

Trial Examiner Norwood: Was your client represented by counsel?

Mr. Little: No, Your Honor, never has been in this hearing. I entered appearance—

Trial Examiner Norwood: They were represented to the extent that they could take advantage of any objections?

Mr. Little: Only to the extent that the stipulation mentions that I can take advantage. Your Honor has mentioned that, and I would like to refer to the statement which I made on the second day of the hearing, December 2d. It was at the time I presented the stipulation.

I said: "Your Honor, as I have heretofore stated,
22235 I am representing the Superior Portland Cement, Inc., with its principal place of business in Seattle, and that company is approximately 2500 or more miles distant and I had not intended when coming here to stay during

the whole of the hearings here and talked to Mr. Wooden on the day of the opening of this hearing and suggested at least on behalf of my company and I thought the same thing should doubtless apply to other companies distant approximately that distance from the place of this hearing and so I have individually agreed with Mr. Wooden and other Counsel representing Respondents who are also far distant have agreed upon the form of a stipulation which I would like now to read into the record and have it understood that it applies to anything at this hearing." I emphasized "anything at this hearing."

I not only appeared separately on the first day, but on that date spoke to Mr. Wooden; I cross-examined no witness; I stated when I left the court room that I was leaving and I wanted it noted.

When the Commission came to Seattle I was now appearing, I was present in the court room and, therefore, I am not, in my argument today, specifying with reference to the Seattle hearing. My argument is directed in so far as the stipulation, the particular paragraph of the stipulation which I am considering, my argument is directed to times when I was not present and I think you
22236 will notice that I am covering that.

Therefore, I have never been represented at any time at this hearing and neither has my client except when I have been present.

I will continue reading:

"—on the ground that each of said exhibits is irrelevant and immaterial and does not tend to prove any fact which is relevant or material to any issue in this proceeding so far as this proceeding relates to this Respondent; and this respondent also objects to each of said exhibits on the further ground that each one of said exhibits is hearsay and is incompetent so far as this Respondent is concerned.

22237. This Respondent objects separately to each exhibit set forth in Schedule "A" with the same force and effect as though the objections were repeated separately as to each exhibit.

(2) This Respondent objects to each portion of the oral testimony which is described in an itemized statement containing transcript page numbers which is attached hereto and designated as Schedule "B" (which said Schedule "B" is hereby incorporated and made a part hereof by ref-

erence thereto to the same extent and with the same effect as though fully set forth herein) on the ground that each of said designated portions of oral testimony is irrelevant and immaterial and does not tend to prove any fact relevant or material to any issue in this proceeding so far as this Respondent is concerned; and also upon the ground that each of said designated portions of oral testimony is hearsay and incompetent in so far as this Respondent is concerned. This objection is made separately as to each question and as to each answer with the same force and effect as though the objection were specifically repeated as to each question and answer.

(3) This Respondent hereby adopts and makes on its own behalf separately each and every objection made to the admissibility of testimony or exhibits and each
22238 and every motion directed against any testimony or exhibits received in evidence, made by or on behalf of any other Respondent or Respondents in this proceeding, and I may say that that is one pursuant to an express provision in the stipulation.

(4) This Respondent objects to and moves to strike from the record herein all evidence in this proceeding in so far as this Respondent is concerned, on the grounds severally (a) that this Respondent is not engaged in interstate commerce and that approximately 99 of all cement manufactured and sold by this Respondent is consumed within the State of Washington and that there is no evidence in this proceeding to sustain any of the charges of either Count 1 or Count 2 of the complaint with reference to the sale of the approximately 1 per cent of the cement manufactured by this respondent which is used in Alaska, and therefore, there is no evidence upon which a Cease & Desist order could be issued with reference to the sale of cement by this Respondent which later flows in interstate commerce; (b) that neither the whole nor any part thereof tends to prove that this objecting and moving Respondent ever at any time entered into any agreement or combination or conspiracy, either express or implied, of any kind or nature whatsoever, with any other Respondent or Respondents herein, or with any other person or persons whomsoever to fix prices or to lessen competition or to
22239 create a monopoly or to restrain trade, or that said Respondent acting either individually or in combination with any other Respondent or Respondents herein, or

with any other person or persons whomsoever, has ever at any time used any unfair method of competition or unfair or deceptive acts or practice in commerce, either as alleged in the complaint on file herein, or otherwise, or at all; (c) that neither the whole nor any part thereof tends to show that this proceeding is based on or involves public interest, or is in the interest of the public; and (d) that neither the whole nor any part thereof tends to prove that all or any of the practices alleged or described in the complaint on file herein now have or had any tendency to injuriously affect the business of any competitor or competitors or this objecting and moving Respondent.

22240 This Respondent for itself and severally, and not for any of the other Respondents, or acting jointly with any of the other Respondents, hereby moves that the purpose, use, effect, and admissibility of such evidence received herein over any and each of said objections be limited so that all and any such evidence shall be deemed admitted solely and only against Respondents other than this objecting Respondent.

In that connection I might say, Your Honor, that we have, therefore, objected first to the questions, and if Your Honor should rule that the objections are overruled then we move that the exhibits and the testimony be stricken, and if Your Honor neglects to strike any or all of the testimony and the exhibits, then we move that the effect of it, as I have just indicated, be limited so as not to apply to this Respondent.

Trial Examiner Norwood: You claim that this agreement that is shown in the record at pages 340 and 341 gives you the right to object now to questions that have been asked all along the line in your absence?

Mr. Little: Your Honor, I do.

Trial Examiner Norwood: That it is retroactive and you can object to exhibits where the identification has been waived just as if you could if you had been present?

Mr. Little: Yes, Your Honor.

22241 Trial Examiner Norwood: I want to ask you something: Do you think that that situation could have been in contemplation of the parties to this agreement at the time; any such—

Mr. Little: Yes, Your Honor, and let me explain why. It is not upon our responsibility that Counsel for the Federal Trade Commission decided to go into what I consider

a great fishing expedition and bring in practically every cement company in the United States and to allege, for that matter, to assume in the first instance that marketing practices of all companies would be uniform. I am not responsible for that, but Counsel has brought it up, has joined us—

Trial Examiner Norwood: I can see where there is consideration for convenience on your part, but what consideration accrued to the Commission's Counsel?

Mr. Little: Let me answer that in just a moment.

Trial Examiner Norwood: I wish you would answer right now.

Mr. Little: The convenience to them, if Your Honor please, it gives Counsel for the Commission and Counsel for any particular company on the West Coast time to sharpen the issues of the complaint and their answer and having more definite and certain rulings upon the evi-
dence which might be pertaining to those issues, and
22242 the companies which are involved.

It is very well illustrated, I think, by the hypothetical question which I want to refer to in just a minute. Now, that hypothetical question could not possibly point out the pages of the testimony which completely destroy it as far as any company in Washington is concerned. That question could not possibly have been properly put, and Your Honor would have sustained an objection to it if Your Honor had been sitting in Seattle when the question was asked, and if it had been applied to the companies in the State of Washington. I don't think there is any doubt about that, and I think Your Honor will agree with me when I point out—

Trial Examiner Norwood: Do you think—

Mr. Little: —the testimony there.

Trial Examiner Norwood: —he couldn't have asked a hypothetical question unless the conditions applied to each and every Respondent?

Mr. Little: Well, I won't make it that categorically, if Your Honor please.

Trial Examiner Norwod: What do you say as to that?

Mr. Little: I say the hypothetical question should be—an objection to a hypothetical question should be first sus-
tained, or, if not sustained, the answer should be
22243 stricken; if not stricken, should be limited as to Respondents; not necessarily one Respondent, those Respondents whose marketing practices are entirely different.

Trial Examiner Norwood: Yes.

Mr. Little: From the assumptions in the hypothetical question.

Trial Examiner Norwood: Now, you must distinguish between—

Mr. Little: Or let me say "entirely", since Counsel says that—

Trial Examiner Norwood: —between the admissibility of the hypothetical question and the subsequent application.

Mr. Little: Well, my motion to limit, Your Honor, raises that question, and let me just say I am not trying to be technical about this because it is a very substantial matter. If we can show as well that the assumptions in the hypothetical question were not even substantially similar to the conditions in Western Washington, then I think neither Counsel for the Commission nor Your Honor could contend with such support that that question would be admissible as against us.

Trial Examiner Norwood: Other Counsel may contend that. That is certainly proper for him to do so, yes.

Mr. Shefelman: I am in precisely the same position 22244 Mr. Little is in with reference to the question Your Honor has asked. I think the question as to what consideration inured, or flowed to the Commission for making this stipulation, is utterly immaterial, because they did make a stipulation. I relied upon it.

Trial Examiner Norwood: It goes to the question of the intent of the agreement, or what the agreement really was.

Mr. Shefelman: If the Court please, where you have an agreement which is as plain on its face as this agreement is, there isn't an ambiguous word in this third paragraph. It says plainly that we may at any time prior to the time we offer our defense, come in and make any such objections or motions directed to or against any of the evidence theretofore introduced in so far as it affects this Respondent. I didn't dream at the time this stipulation was made that an effort would be made at the end of the Government's case to change the plain meaning of this stipulation. I had a right to rely upon it, and if the stipulation had not been made we would have then been compelled to take some steps to protect ourselves, which we have never been able to take.

Mr. Wooden: Your Honor, I would like to say that no effort has been made, so far as Counsel for the Commission is concerned, to prevent them making any such
22245 contention or motion or objection. The whole question that we have been disputing is, what is the effect of it, and how far-reaching is it, and how far back does it go, and to what other objections or lack of objections made by other Counsel do their objections apply?

I want to say further that at the time we made this stipulation for the deferred cross-examination, and the deferred making of motions and objections on the part of the Pacific Coast Respondents, that Counsel for the Commission did not have in mind one solitary benefit to accrue to Counsel for the Commission from that stipulation. It was made wholly and solely for the convenience of Counsel for the Pacific Coast Respondents. We got nothing whatever out of it, and had nothing in contemplation to get out of it except to serve the convenience of Counsel for the Pacific Coast Respondents.

Let me say further, that to apply and interpret this stipulation now as giving effect to the objections and motions of Pacific Coast Respondents made here and now, giving them the same effect as though they had been made by Counsel who are present all through the hearing I think is doing violence to the plain intent, and it is doing violence to the fairness of the situation. It is nothing more than an effort to paralyze the whole proceedings and to cast in
22246 doubt the validity of the whole proceedings by trying to ring in objections that were not made timely and have them accrue to the benefit of the people who have been present throughout this hearing.

Mr. Clark: Well, now, if the Court please—

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: I agree with Counsel on that, and I have read this particular paragraph two or three times, and it doesn't mean that.

Mr. MacIntyre: If Your Honor please, may we ask for a ruling—

Trial Examiner Norwood: It says "without prejudice to rulings heretofore made," and in those cases where there was no objection at the time, and there was an agreement asked as to identification, or identification waived, and so on, and there was no ruling on it.

Mr. MacIntyre: If Your Honor please, I would like to ask for a ruling—

Trial Examiner Norwood: And I don't see—

Mr. Clark: May I be heard, if Your Honor please?

Trial Examiner Norwood: Just a minute. I don't see how that situation could possibly have been in contemplation of the parties here. It is stretching an agreement that was made for the convenience of Counsel, and the rights now claimed under it here if they were in contemplation of the parties here, I should never have approved of
22247 it. Mr. Wooden: And I certainly would never have agreed to it if I had known it would have been abused in such manner.

Mr. Clark: I merely want to say this, if the Court please: The position I took at the outset here, the position I took before three of the Commissioners—I had heard about this stipulation by correspondence with Mr. Wooden, and I heard about it in the statements before the Commissioners—my only answer is that the stipulation was made, whatever it may mean, and the rights that I am claiming at this present time so far as the motions are concerned are claimed under the stipulation. Now, what the stipulation means it remains to be seen. I have my own ideas about it, and I am willing to rest upon those ideas. But I do want the record to show that I resent, and I bitterly resent, the statement of Counsel here that any attempt is being made to use this stipulation now in a way that is not contemplated by the language of the stipulation. I simply want the record to show that. I don't engage in that kind of practice, whatever Counsel for the Commission engage in.

22248 Mr. MacIntyre: If Your Honor please, may we ask for a ruling at this time on this point, and that is this: That whatever effect and whatever application is made of any belated objections by Pacific Coast Respondents' Counsel pursuant to the terms of the stipulations that have been referred to as appear on pages 340 to 344 of the record, that it shall not have any application to inure to the benefit of Respondents' Counsel who were present throughout the hearings and who failed to make objections to questions or to evidence in the form of testimony, or in the form of exhibits, that the understanding that we have had heretofore, that objections made by one

Respondent Counsel should inure to the benefit of others shall not apply with respect to any belated objections made today or yesterday by Pacific Coast Counsel under that stipulation. We ask you to rule to that effect at this time.

Trial Examiner Norwood: Well, I think that Counsel is right in one respect, that these subsequent proceedings and these objections of the Pacific Coast Counsel should not operate to extend any technical benefit to the other Respondents, but if they brought out any facts here, that may be applied for the benefit of the other Counsel.

Mr. MacIntyre: That is a different proposition.

22249 Trial Examiner Norwood: That is something else, yes.

Mr. MacIntyre: As to evidence. We are talking now about belated objections being made by the Pacific Coast Respondents' Counsel inuring to the benefit, if it is possible that it can be of benefit to anyone—inuring with full force and effect and benefit to other Respondents' Counsel who were present throughout the hearings and did not make timely objections. We consider that any of the objections, of course, are out of order and untimely, but in the event that they should even as made untimley and out of order—in the event that they are to be given any application, we want it understood that there is no understanding or agreement that they shall inure to the benefit of any other person than the ones making them, if it inures to his benefit at all.

Mr. Zimmerman: As I said this morning, the only reason I rise again to say anything on the subject is because since this morning I have examined the transcript of the proceedings, and I did ask this morning that whatever motions and objections were made, that is to say, whatever was said by Mr. Leisure or by Mr. Clark, Counsel here, in the way of objections or motions might be considered as being said with one voice on behalf of

22250 each and every one of the Respondents, that it be not necessary for us to arise and go through the rigmarole of saying "I join in" and so forth, that we were doing it then. Now, that sentence did not ask for Mr. MacIntyre or Counsel to agree to anything beyond that at all. I only asked that that be done, but I am not sure from the state of the record that even that much was agreed to, because I think I must have been misunderstood, for I

did say, "Now, to the extent that we should have the advantage of those objections that is, to whatever extent we may have them under the state of the record, I can see no reason why Counsel for the Commission should hesitate in agreeing that whatever Mr. Clark says in the way of objections and motions to strike are said as well on behalf of all other Respondents."

22251 Now, that is not asking them to agree to what extent we do have advantage of them, but—

Mr. Wooden: I challenge his right to say it. I challenge his right to say it on behalf of the others.

Mr. Zimmerman: Well, I don't really believe you mean that.

Mr. Wooden: I do.

Mr. Zimmerman: Well, I am astonished.

Mr. Wooden: I am not saying that I can physically restrain him from saying it. I challenge his right to say it.

Mr. Zimmerman: He certainly has a right to say it for me. I say he has a right to, and as far as I am concerned, I am saying now that I adopt every objection and every motion made by Mr. Leisure and by Mr. Clark here today, and will continue to do so, and I will say now that so far as any objections or motions that they make, I want this record to show that I shall not take time in each instance to rise up and say that I join in, because I do now join in them on behalf of my clients.

Trial Examiner Norwood: Well, I think that that would obtain anyway.

Mr. Zimmerman: I do, too.

Trial Examiner Norwood: On account of our previous understanding.

22252 Mr. Zimmerman: I do, too.

Mr. MacIntyre: If Your Honor please, we ask you to rule now that that previous understanding, that an objection made by one Respondent's Counsel shall not inure to the benefit of any other Respondents' Counsel under the agreement that was entered into by Mr. Wooden with Respondents' Counsel on the first day of this hearing, because here if it is applied to objections raised today, it has a retroactive effect—

Trial Examiner Norwood: Counsel has spoken twice on that point, and I have made my ruling.

Mr. MacIntyre: Well, we would like it clear.

Trial Examiner Norwood: So far as my ruling—

Mr. MacIntyre: We would like it clear that the Respondents—

Trial Examiner Norwood: To determine anything—

Mr. MacIntyre: —that the Commission's Counsel are not agreeing to any understanding that it shall inure to the benefit of others.

Trial Examiner Norwood: Go ahead.

Mr. Little: I would like to continue, if Your Honor please, prefacing it with a statement which I think may assist in the interpretation of the stipulation. If Your Honor will read the first paragraph and the third paragraph and see the different purposes intended by
22253 each paragraph. The first paragraph was intended—

Trial Examiner Norwood: I have read it.

Mr. Little: Yes. The first paragraph being intended to enable any Respondent to take advantage of objection made by another, the third being for the benefit of counsel when not present and enabling them to make an objection which may not have been made when they were absent. It is quite obvious that a substantial right was intended to be protected, and I want to say, as Mr. Clark said, that I am not trying to take advantage—

Trial Examiner Norwood: Without prejudice as to previous rulings.

Mr. Little: Yes, but it is more than that, if Your Honor please. It says that we can make any—

Trial Examiner Norwood: Well—

Mr. Little: —any objections or any motions directed against any evidence. It doesn't say any evidence which went in over objection. It doesn't say that. Any evidence. And, naturally—

Trial Examiner Norwood: Well, I would certainly consider that it doesn't give you a right to object to the questions. We have discussed that, now.

Mr. Little: Even though my client was not represented by Counsel at the time?

Trial Examiner Norwood: Yes.

22254 Mr. Little: And I wasn't present because of distance?

Trial Examiner Norwood: Yes.

Mr. Little: In other words, one of the principal advan-

tages of the stipulation is now being denied us, in other words, that we can't object to questions which were asked in our absence which were immaterial or incompetent or hearsay or for other reasons improper as to our clients?

Trial Examiner Norwood: You can move to strike that testimony.

Mr. Little: Well, I have, and I am doing it now.

Trial Examiner Norwood: Well, go ahead and move it. I don't think that the agreement covers all you claim that it covers, and I don't think it covers your right to make objections now to those questions which were answered without objection.

Mr. Shefelman: May I say this, if the Court please?

Trial Examiner Norwood: In the presence of abundant counsel here for one or the other of these Respondents.

Mr. Shefelman: If the Court please—

Trial Examiner Norwood: Yes.

Mr. Wooden: Your Honor—

Mr. Shefelman: Your Honor is making this stipulation meaningless. Why shall these Respondents object
22255 to a question which may affect every other cement company in America except the Northwestern Portland Cement Company? I am the only person who would be interested in objecting to that. I am not present. The others, therefore, see fit, of course, that it affects them. As far as I am concerned, it is immaterial.

Trial Examiner Norwood: Have you confined your objection to those particular ones?

Mr. Shefelman: I am confining my objections to questions which were objected to which do not affect us and ask questions which were not objected to on the ground, if they do not affect us, and if your Honor does not so interpret the stipulation, it is utterly meaningless.

Mr. Wooden: Well, I would like to say, your Honor—

Trial Examiner Norwood: I am not the final interpreter of the stipulation, but I am telling you what I think about it.

Go ahead.

Mr. Wooden: My objection goes to everything, any objections or motions they now make, or have been making, inuring to the benefit of other Respondents.

Trial Examiner Norwood: Yes.

Mr. Wooden: And not the proposition of what they may object to but how far their objections run.

Mr. Little: Your Honor, I will just proceed in
22256 making my motion and the stipulation can speak for itself.

Trial Examiner Norwood: Yes.

Mr. Little: I do not have any desire to argue the point any further. I think my position is quite clear, and I think your Honor has stated his position.

Trial Examiner Norwood: Yes.

Mr. Little: And I merely want to say that I take exception to that construction.

Now, the last paragraph of my motion is: "Each of the foregoing objections and motions is made separately as to each separate count in the complaint, and is also made separately as to the complaint in its entirety, with such force and effect that the relevance, materiality, competence, and admissibility of all evidence herein referred to may be ruled upon separately as to each separate count and as to the complaint as a whole."

Now, I would like it to be understood—I think it is already in the record, so I won't take much time on it—I would like it to be understood that while I am not physically reading the pages of Schedules "A" and "B," they will be deemed to have been read.

Now, I would like to address myself, if your Honor please, to the specific—

Trial Examiner Norwood: Is that marked, for identification?

22257 Mr. Little: It is, your Honor; Respondents' Exhibit 392.

I was speaking about the hypothetical questions which were asked of the economic witnesses. The first paragraph, which in a sense was the key paragraph of each hypothetical question, assumed a general practice in the cement industry of mills quoting and selling only at delivered prices. And I want to underline and emphasize the words "selling only." The evidence is absolutely unrefuted now that with reference to all reclamation bids since the code and twilight period of the code, that with reference to all the procurement division bids, ever since the procurement division took the work over, with reference, in fact, I will say to your Honor, to every invitation for bid and bids in response thereto affecting the companies in Western Washington, since, as I said, the code period and the twilight period, the bids have been f.o.b. mill whenever requested. The only possible exception which Counsel could claim are

two bids which went in on what we call a derived f.o.b. mill basis, but which Counsel apparently construes in some other way, a bill allowing the Government to deduct the commercial rate and get the full benefit of the land grant rate, giving the Government thereby an f.o.b. mill price for all purposes.

Mr. Wooden: Of course, I dispute the statement.

22258 Mr. Little: I realize that Counsel does.

Trial Examiner Norwood: You may answer later.

Mr. Little: I addressed myself there to only two invitations there. There are literally scores of others in evidence now, and every one was f.o.b. mill whenever requested, indicating that there is no trivial dispute about that first paragraph. It is an absolute falsehood, so far as the conditions in Western Washington are concerned. I am not accusing anybody—

Trial Examiner Norwood: Supposing it should be decided as a matter of inference, legitimate inference, and as a matter of law, that a derived bid is not an f.o.b. mill bid, a true f.o.b. mill bid. Suppose that should happen, and there is some testimony—

Mr. Little: Well, then, if your Honor please, while I deny the suggestion that that isn't an f.o.b. mill bid—

Trial Examiner Norwood: Yes.

Mr. Little: —and the Government can't very well in good grace now say it isn't, when one of the exhibits in evidence indicates that they admit that it is an f.o.b. mill bid—

Trial Examiner Norwood: Yes.

Mr. Little: —but regardless of that, the important thing is that this question assumes that we refused in each instance to bid f.o.b. mill. The evidence is at least

22259 clear on this point, that in every instance, with the possible and the disputed exception of two out of scores, it was a clear f.o.b. mill bid without any limitations.

Mr. Wooden: Mr. Little, have you forgotten the testimony of your Seattle officials?

Mr. Little: Not in the slightest.

Mr. Wooden: Concerning commercial bids?

Mr. Little: I am talking now about the Government. I will come to the commercial.

But on Government bids—by the way, this question doesn't make any distinction between commercial or Government bidding—just one general assumption. That is

another fault, and I am glad you called my attention to that. In other words, even in these two instances we have a dispute as to the meaning, which isn't cleared up by this hypothetical question.

I would like your Honor to define for me now what is a derived f.o.b. mill bid, or I would like Counsel to define it for me. It isn't defined in this question. The thing I was endeavoring to point out is that whatever may be the correct definition of a derived f.o.b. mill bid, this was not a refusal to bid f.o.b. mill. It was an offer to give the Government the benefit of the land-grant rates. We didn't
22260 even use the control clause which first was objected to and later was, at least in one sense, approved by the Comptroller General's decisions in January and February, 1937. What I am doing now, trying to do, is a limited thing, your Honor. I am merely trying to show, without overstating the evidence, that whatever the evidence is it doesn't apply to the assumption in the first paragraph, and I don't see how any reasonable man can claim that the conditions in Western Washington are an absolute refusal to sell or quote on an f.o.b. mill basis.

Now, let me come to the commercial situation, and I will be very happy, if Counsel wants it, to give him the citations of the transcript, because I have studied the testimony very carefully, because these motions are not merely matters of form; they are matters of substance.

In the first place, Mr. Tongue testified that Superior Portland, at both Concrete—no, at its mill in Concrete—had always, since it commenced to do business, sold on an f.o.b. mill basis until—and until when? Until competition forced them to do it. And I will refer, if Counsel is interested, to transcript page 8390.

He went farther than that. He said: "We did it because our customers demanded it." Now, let me call Your Honor's attention to what I mentioned this morning. Let
22261 us assume that they were available, and I am now referring to transcript page 15896, the answer to Mr. Zimmerman's question of Dr. Viner—let us assume that they are available to all buyers who asked for them, that is, f.o.b. mill bids. "Would that change the meaning?" "Very substantially." And then Mr. Tongue testified—

Trial Examiner Norwood: Read that again.

Mr. Little: "Would that change the meaning?" And the answer was: "Very substantially." So that if the

question had assumed what I am now stating to be the evidence at the Seattle hearing, that on commercial sales Superior and Olympic and Northwestern—no, Northwestern wasn't in the picture then—Superior and Olympic had bid on an f.o.b. mill basis on all commercial sales until two new plants came in, and the competition resulting from over-capacity, the competition which was sharp and keen, forced Superior, as he testified—and that testimony was never rebutted, and can't be rebutted—that they were forced to sell on a destination basis because the customers asked for it.

22262 Now, then, he went on to say that the only reason we didn't deliver to trucks at the mill starting in about 1931, was because of the fact that it completely interrupted packing house operations and was very expensive to install a new packing house and loading platform just to accommodate a very few dealers who had at times come to the mill for cement.

He further testified that even the Massar Lumber Company had bought 99 per cent of its purchases at destination because it preferred it; that there was no demand for f.o.b. mill shipments; quotations, and he went on further to say, which I think is rather important, that Superior did make deliveries and quote f.o.b. mill to trucks when they purchased sacked high early strength cement and the transcript number on that, I will refer to in just a moment, if Counsel desires.

He went on to say that we will also deliver f.o.b. mill and quote f.o.b. mill to trucks in carload lots. It was merely a matter of inefficiency in packing house operations.

I have spoken thus far of Superior.

Knappenberger, of the Oregon Portland Cement Company, testified they had continually sold f.o.b. mill and that cement moved to Yakima and southwestern Washington in competition to cement which we were
22263 selling in those places.

When you take a broad picture of that situation you find this, a uniform practice of quoting f.o.b. mill on Government business. You find an uncertain practice on commercial sales due to the competition which has existed and is very keen in western Washington and you have no such a thing as a so-called multiple basing point system existing because you have the great area in southwestern Washington where arbitrary prices prevail, water com-

pelled rates on the Sound, all of that great Olympic Peninsula buying cement on a water basis; all the Yakima area buying cement on the trucking rate basis, so that you have anything but the assumption of this question of mills refusing, uniformly, to sell commercial cement on an f.o.b. mill basis.

You have some mills which, for reasons of convenience, don't sell, as a general practice, in less than carload lots to trucks at f.o.b. mill, and we are not ashamed of the explanation. It is an honest, commercial situation. Neither Your Honor nor Mr. Wooden would invest thousands of dollars to put in a new packing house or loading platform if it were not practical.

Mr. MacIntyre: May I interrupt with a question before you launch into the next?

22264 Mr. Little: Yes.

Trial Examiner Norwood: With Mr. Little's permission.

Mr. MacIntyre: Mr. E. P. Lucas is president of your client, Superior Portland Cement, Inc.?

Mr. Little: That is right.

Mr. MacIntyre: Is he still president?

Mr. Little: If Your Honor please, I am not a witness—

Mr. MacIntyre: Will you please inform the Examiner when he resigned from the Cement Institute and how long he was a trustee of the Cement Institute?

Mr. Little: In the first place that question is entirely immaterial at this time.

If in their case at any time they had wanted to call me as a witness I would have gladly sworn to tell the truth and the whole truth.

I am now making motions to strike and to limit and Counsel's statement is entirely out of place.

Trial Examiner Norwood: I only let him ask the question because you permitted him.

Mr. Little: My second point was the assumption in the question to Dr. Fetter and other expert witnesses that there were some basing points and some non-basing points.

The evidence is clear there are not only no
22265 basing points but also no so-called basing points so that that question is entirely immaterial.

Trial Examiner Norwood: Would you say the so-called basing points are logical concepts?

Mr. Little: Whatever definitions there are about basing.

points in this case, and they have been defined by many witnesses, they have all been defined in a different sense.

Mr. Paulson: Before Mr. Little passes to another subject, he having been discussing the subject of the applicability to the Superior Portland Cement, Inc., of the economists' testimony, I would like to make a very short statement regarding his discussion there and it merely is this: That the question of whether or not the economic testimony applies to Superior Portland Cement, Inc., is one of whether Superior is a co-conspirator or a conspirator with the other Respondents in their alleged effort, as a whole, to suppress competition.

In other words, it seems to me we can't decide under the motion whether or not economic testimony should be stricken unless you consider the whole question of whether or not they are co-conspirators or conspirators.

Trial Examiner Norwood: I think Counsel is right about that. I think there are other points involved than whether or not this testimony should be limited or
22266 excluded from application to your clients. There are other points besides refusal to quote f.o.b. mill. I think that is rather a small point.

Mr. Little: Well, if Your Honor please, a lot has been made of it.

Trial Examiner Norwood: It is claimed here as an evidentiary point.

Mr. Little: If it had been a small point Counsel wouldn't have taken as many days and produced as many witnesses to show refusal to bid f.o.b. mill.

I want to answer Mr. Paulson. I have been objecting to a question which assumed things which weren't true, as far as the northwest was concerned. I am not talking about the whole case, but I would like to suggest to Mr. Paulson it is a rather surprising theory that one Respondent could be charged with being a co-conspirator conspiring not to bid f.o.b. mill when it does bid f.o.b. mill.

I wish these charges would be less vague. What have we conspired to do? Have we conspired as to this assumption to refuse to bid f.o.b. mill? I say, clearly, we have not because we do bid f.o.b. mill, so we have not conspired.

Trial Examiner Norwood: Your theory is this, then:
If you show that one of those conditions named in the
22267 hypothetical case does not apply, that the evidence doesn't show that it applies to your client, then I should rule now that the question be limited here and now?

Mr. Little: That is what I wish Your Honor to do.

Mr. Shefelman: That is the basis of any hypothetical question, if the Court please. It must apply.

Trial Examiner Norwood: You can destroy the single condition and the entire answer doesn't apply to your client?

2268 Mr. Little: That is right.

Trial Examiner Norwood: I think you are right about that.

Mr. Little: I have not only shown one condition, but three, because all three do apply.

Mr. Wooden: I don't agree that that is the effect, Your Honor. I can only agree pro tanto it does not apply.

Trial Examiner Norwood: I think it does not apply, logically, or legally, but I am not prepared to find just wherein they don't apply, at this time. In other words, I am not prepared to make a finding of fact on that at this time.

Mr. Little: I am giving this in support of my argument, and I think Your Honor is well enough versed in logic that in a syllogism the conclusion cannot be reached if the major premise is not founded, and I am showing several of the major premises are not founded in fact, and to summarize the three important facts assumed in all of these questions, to-wit, the refusal to bid f.o.b. mill, whether in every instance, or in most of them; second, the existence of both basing points and non-basing points; third, the computation of destination prices upon the basis of the so-called,—which I don't acknowledge,—base price plus all-rail freight, doesn't exist.

Since all three of those very important major
2269 premises are not applicable to the situation in the Pacific Northwest, I submit that Your Honor would have, if this case only involved us and no other Respondent, Your Honor would have ruled the question out. I have confidence in Your Honor's ruling that he would have ruled it out, and from what Your Honor has stated I assume that Your Honor would limit the testimony of those witnesses, so it wouldn't apply to a situation so radically different in the Pacific Northwest. That is the reason for my motions both to strike, and, in the alternative, to limit.

Mr. Paulson: Evidently I didn't make my point clear. It applies in this way, that it is evidence as to a general conspiracy amongst all of the Respondents, and that the

Superior Portland Cement, Inc., has assisted, contributed to that general conspiracy. Therefore, any evidence which was admissible, which tended to show the general conspiracy, would also apply to the Superior, and that is the theory upon which it applies. It doesn't apply directly to the Superior, it applies by showing the general conspirators to it.

Mr. Little: I am pointing the argument up this way merely to show the lack of logic in the argument that we can be charged as a co-conspirator in doing a thing which we don't do. We can't couspire with another man—let me make it clear to Your Honor—we can't be in con-
22270 spiracy with a man or with a company to do something if all of the acts, all of the evidence shows we are not doing it, or refusing to do it.

Mr. Wooden: That is not technically correct. You can have a conspiracy or agreement that one party doesn't abide by.

Mr. Little: Then we shouldn't be joined in this cease and desist order.

Apparently the point is to prevent us from doing something. I think the whole proceeding is technical against my client. I would like to ask Counsel if he wants Superior to cease and desist from bidding on an f.o.b. mill basis.

Mr. Wooden: I notice Mr. Little has not specified the time involved when they did and didn't.

Mr. Little: I have made it pretty clear—

Trial Examiner Norwood: We are making this Counsel take more time than anybody else, and I think we should let him go ahead and finish and then Counsel may reply to it.

Mr. Little: In conclusion, about my point about the economic witnesses, I want to state that I have emphasized it because I do not want Your Honor or the Federal Trade Commission to draw any inferences from any of the answers made by the economic witnesses which might
22271 be applicable to the situation in the Pacific Northwest. If you wouldn't limit the testimony then Mr. Shefelman and myself might be placed under this burden, I don't say we would, because I think the testimony is now really so worthless, as far as we are concerned, we may not have to pay any attention to it at all, but we might be placed in the position of having to call economists, ourselves, to dispute the questions which were asked, and the

answers given by these economic witnesses; and it would put us to a great expense which wouldn't be warranted since the testimony is not applicable, so it involves a very real thing to us, a very expensive proceeding to us; having to wait several months reading all the evidence on the Respondents' case. Some of the exhibits don't reach us for two or three weeks; we have to analyze all those and then, perhaps, a year from now you have a special hearing on behalf of our own particular Respondents, and put evidence on to rebut economic testimony which never applied to us in the first instance.

Then I want to say further, referring to the schedules, themselves, the motions with reference to Dr. Edward Duddy will be found in Schedule "B," page 138;

With reference to Dr. Hibbard, Schedule "B," page 138;

With reference to Dr Viner, Schedule "B," page 138;

22272 With reference to Dr. Fetter, Schedule "B," pages 139 and 140, and

Dr. Oakley, page 140.

I want it to be clear that my motion is not only as to the specific pages of their testimony which are listed in the schedule, which I have referred to, but also is to strike all of their testimony, and, in the alternative, to limit their testimony so it wouldn't be applicable.

I think that concludes what I have to say about the economic testimony.

Now, I next want to call Your Honor's attention first that my motion, and the Schedule "B" attached thereto, relates to all of the testimony of the Witness White, and the specific page references are in Schedule "B," pages 40, 41, 62, 129, 137, 138—

Trial Examiner Norwood: I think that Counsel will find that all of that has been stricken.

Mr. Little: If Your Honor please, some of it may not have been. Page 139 is the last.

I am moving to strike all of Mr. White's testimony, not only the specific pages listed in Schedule "B," but all of his testimony, and I read an abstract of the record last night very carefully; there isn't one scintilla of his testimony which relates to any Pacific Northwest Respondent; and while I am pointing out certain specific

22273 things, I don't want the inference to be drawn I am limiting my motion. This is in addition and

specifying certain very typical and important instances of the immateriality of the evidence in so far as it relates to us.

I next want to point out all of the testimony of the witnesses Harold Cree, Lucille Fowley, Mr. Crapo, and Mr. F. R. Johnson.

22274 The motions with reference to Cree, pages 43 to 54 of the Schedule "B".

With reference to Lucille Fowley, page 52 and 53;

With reference to Mr. Crapo, pages 131 and 132; and Mr. Johnston, pages 54 and 58.

None of that testimony either directly or indirectly related to any trade practice in the Pacific northwest; couldn't possibly have been.

Trial Examiner Norwood: What is it you want done about that?

Mr. Little: I have moved, first, to strike it, and I am pointing Your Honor's attention out to how immaterial it is and if you don't strike it I ask Your Honor's rule it be limited.

It couldn't possibly have anything to do with the situation in the Pacific northwest. This is just another example and there were literally over a thousand pages of testimony and hundreds of exhibits dealing with a situation which prevailed in a part of the country so far away, 10 times as far away as we could sell cement; couldn't possibly affect us.

I am pointing these things up because I assume Your Honor will give real consideration to them.

The next respect I want to call Your Honor's attention to is an objection and motion to strike in regard to 22275 the T.V.A. witnesses Arthur Morgan and Edwin C. Eckel. It couldn't possibly refer to our respondent and since Your Honor indicated he was going to rule when he stated in the beginning of the proceeding that unless connected up it would not be held binding upon us, I think Your Honor should rule all of that T.V.A. testimony should not be considered so far as this Respondent is concerned and no inferences should be drawn therefrom.

If that weren't done it would put such an unreasonable burden upon the Respondents from the northwest, on any Respondent, that it would be unreasonable.

Trial Examiner Norwood: Suppose by the entire record your client is connected up with activities of the Cement

institute and suppose those activities were found within the terms of the complaint, then would it not apply to your client?

Mr. Little: Your Honor assumes things which I would like to state in a different way.

The evidence will show that we joined the Cement Institute. We make no apologies for joining the Institute. Your Honor has the exhibit which sets forth the articles of incorporation.

The Superior Portland Cement, Inc., joined the Cement Institute on the basis of the purpose of the cement
22276 Institute. Those purposes are absolutely legal. The Cement Institute is a lawful organization and we had the right to join it.

Trial Examiner Norwood: I am not wanting to argue that. I am just stating a hypothetical question, here, to bring out your attitude to the legal questions.

Mr. Little: That is why I restated it. No inference should be drawn in the absence of some testimony connecting up a Respondent by some overt act other than joining the Cement Institute.

Trial Examiner Norwood: That was not my question.

Mr. Little: There have been thousands of institutes organized in the United States and unless there is some showing that a Respondent in joining an institute is doing an unlawful thing, no inferences should be drawn.

I next want to call Your Honor's attention to another claim of witnesses who testified with reference to trucking conditions and so-called inferences between railroads and dealers in New England and other places on the Atlantic Seaboard and I think that testimony of all of those witnesses, W. W. Campbell, J. L. Eysmans, Jacob Gottschalk, Joseph Powers, C. J. Brister, John P. Callahan, William McClellan Pomeroy, J. B. Large, G. M. Harper, A. T.
Hansen, and Phil Runion and I will be glad, if Your
22277 Honor desires, to give the transcript numbers. They are all in the motions and schedules but I have them here—

Trial Examiner Norwood: No, you needn't do that.

Mr. Little: Those should be stricken because no Respondent in the Pacific northwest was in any way connected up with that testimony and to draw inferences therefrom would be unfair and prejudicial and I think no Court would order us to go to the extent to rebut testimony which doesn't involve us; possibly.

Mr. Wooden: You don't need to rebut it, then.

Mr. Little: That is an entirely different question. I think when Mr. Wooden says we don't need to rebut it we may assume he considers it is not applicable.

Trial Examiner Norwood: I think we will have a five minute recess.

(Whereupon a short recess was had.)

Trial Examiner Norwood: Go ahead.

Mr. Little: Your Honor is ready for me to proceed?

Trial Examiner Norwood: Yes. Go ahead.

Mr. Little: I now want to call Your Honor's attention to witnesses who testified with reference to bidding in certain States, particularly highway bidding and State Procurement officers who testified with reference to Government bids in their States.

22278 Obviously they confined their statement to cement which was purchased for use in the state over which they had jurisdiction, and no inferences should be drawn from that testimony which would affect us.

The witnesses whom I have in mind, particularly, and if I don't mention all of them I want it to be understood I intended to cover all: Harry E. Harman—the complete list in Schedule "B" does contain all the witnesses' names—W. E. Harkness, J. E. McNair, E. W. Blom, William D. Vogel, William Foley, Clarence Hamlin and Leonard Astell. It would simplify, necessarily, our defense in this case if Your Honor would make a ruling that either that testimony is stricken—first, that our objections are sustained to those questions, or that the testimony is stricken, or that it is limited not to apply to us.

22279 Then I want to call Your Honor's attention to the testimony of the witnesses on the Atlantic Seaboard relating to the importation of cement and alleged boycotts with reference thereto: Walter Miller, Joseph Ryan, Joseph W. Ray, Steven Duffy, and Frank M. Dain. Their testimony couldn't possibly involve us. They were testifying with reference to conditions in New York, Brooklyn, Boston, and the surrounding territory. By no stretch of the imagination could it apply to Seattle, Wash., or any place on Puget Sound.

I am not going to argue that point any further because I think it is so obvious that it would merely consume too much time.

Furthermore, there are a number of witnesses in the

Cleveland hearing, railroad officials and dealers; I think their testimony should be stricken, anyway, under the motions made by Mr. Leisure for the reasons he stated, hearsay, among other things, but, clearly, they are not admissible against us for the reasons stated, and those witnesses are P. J. Pfeiffer, H. L. Baird, H. N. Hansen, W. F. Dorsch, J. C. O'Boyle, E. J. Holway, and W. T. Starr, and J. L. Dankel, and I wish Your Honor would refer to the testimony of these witnesses to check his recollection and note that there isn't anything for us to rebut with reference thereto, and, therefore, Your Honor should
22280 limit it so that it wouldn't apply to us.

I hope that by having picked out certain witnesses Your Honor will not think that I am not equally interested in Your Honor considering the objections and motions as a whole because, in my opinion, all of the testimony and the exhibits which are listed in the Schedules "A" and "B" of my objections and motions is not properly admissible as against our client, whether it is admissible against other clients or not.

I have failed to renew one motion which I intended to, and which I think is quite proper to renew at this time.

I also move, again, to strike all of the testimony of the witness Fry and all of the testimony of the witness Taylor. I renew the motion for this reason: I called Your Honor's attention to the transcript at page 340 when I made the statement that I had had a conversation with Mr. Wooden on the opening day with reference to this stipulation. I stated to Your Honor when I made the original motion to strike the testimony of Mr. Fry that it was my recollection that I had not participated in the cross-examination of Mr. Fry, and that I had said to Mr. Wooden on the opening day that I wanted some understanding, and received an informal understanding on the opening day, and, therefore, assumed, as my statement said, that the stipu-
22281 lation would apply "to anything at this hearing," and, therefore, feel that by not being permitted to cross-examine the witness Fry my rights on cross-examination have been seriously limited.

I want to state that I renew the motion as to both Fry and Taylor for this added reason. The letter which was sent on my behalf to Mr. Wooden, and copies sent to the witnesses whom I desired to cross-examine, and I now refer to Respondents' Exhibit 206-A to H, for identification.

contained lists of invitations to bid and responses thereto and abstracts to the materials relating to projects for the Indian Service and National Park Service.

Those documents were not made available to me for the purpose of cross-examining either of those two witnesses. In my opinion, and I will just briefly state it because it has been partially covered before, none of the testimony of those witnesses was proper because the basic data was not in the courtroom when they testified on direct examination, and I asked it on delayed cross-examination, and it was not made available, and there is a federal statute under which it is possible, not only possible but clearly within the legal rights, of one department of the Government to obtain documents in another department of the Government, and the Federal Trade Commission was in a position to obtain the documents which I re-
22282 quested in my notice. There was no surprise. In my opinion, it was, therefore, the duty of Counsel, not only based upon the fact that he put a witness upon the stand of whom I asked questions concerning the contents of those documents, and he should have had the documents here, both on direct and cross.

Since I was deprived of the right of access to those documents, which I clearly had the right to have, even though Your Honor might be right with reference to the right to cross-examine Fry, I was entitled to have them with the witness Taylor because I asked them to be produced, and it was for Your Honor to rule as to whether they were material, and that notice to produce was not complied with.

Therefore, I am clearly within my rights, being prejudiced, as I have stated, in moving and renewing my motion to strike the testimony of Fry and Taylor.

In conclusion, particularly in view of a little speech which Mr. MacIntyre made a short time ago, I want to state that having come to Washington at expense to my client, a journey of over 2500 miles, I want to take as practical a view of this hearing as it is possible to do. I can't believe that it is the purpose of the Government, or the Federal Trade Commission, to hold a lengthy hearing which may run into another year or two, a hearing
22283 which may later have to be appealed to the courts, to order any Respondent to cease and desist from doing a thing which, if they did during the code period

days, they did at the behest of the National Administration; I am very serious about this point; to drag us for months and months, and, I will say, years, through a hearing, the sole legal purpose of which is to order us to cease and desist from doing a thing which, at the worst, we haven't done since the Blue Eagle died.

This isn't just mere rhetoric; it is said with sincerity, and my client shouldn't have to continue to spend thousands of dollars in defense of the case just to be ordered not to comply with what it thought worthy provisions of the National Industrial Recovery Act, and the Code, and on my delayed cross-examination of witnesses whom I asked to be produced, I particularly drew their attention to the uniform practice of my client, and other companies in Western Washington, with reference to quoting f.o.b. mill whenever requested, non-identical destination costs in every single public bidding since the twilight period ended.

Mr. Wooden: When was that?

Mr. Little: From 1936 right to the present time.

Mr. Wooden: I am always interested in learning when that twilight period ended.

22284 Mr. Little: It has been spoken of many times in this case. The evidence is rather clear that there was sort of an interim period. Human beings naturally adjust themselves in a transitional way to any new events; and there is no denial that there was a twilight period, and I merely want, in closing, to call Your Honor's attention to the great expense and great inconvenience which will result to my client if this testimony is not so limited, that it does not apply to the Superior Portland Cement, Inc., if my motions to strike are not granted. It is of very great concern, and I hope the Commission will not adopt a purely formal—that Your Honor will not adopt a purely formal point of view in this matter, but will regard the substance of my motions, both as to strike and to limit, to recognize how important it is that a useless thing not be continued.

Thank you.

Trial Examiner Norwood: I think that we will hear from Mr. Zimmerman now. I shall take your motion under consideration, Mr. Little.

Mr. Zimmerman: If the Examiner please, at record page 18220, I made a motion to strike certain portions—

Trial Examiner Norwood: What is that number there?

Mr. Zimmerman: 18220. I made a motion to strike certain portions of the testimony of Dr. Fetter, and I
22285 did undertake to specify certain pages and lines of that so that Your Honor might see exactly what that went to, and in renewal of that motion the point was that Dr. Fetter, in answering the hypothetical questions propounded to him by Mr. Wooden, Counsel for the Commission, had included, taken into consideration, and incorporated in his answers, material and knowledge constituting facts not contained in the hypothetical question.

The pages and lines are as follows:

Page 17645, lines 24 and 25; 17646, line 17; 176—

Trial Examiner Norwood: Wait a minute. 646?

Mr. Zimmerman: Yes, sir. I thought the Reporter would be taking this so that—

Trial Examiner Norwood: Line 17?

Mr. Zimmerman: Yes, sir. 17648, lines 16 to 19, inclusive;

17651, lines 16 through line 19; lines 22, 24, and 25;

Page 17652, lines 1 through line 13, and line 20 through line 25;

At page 17653, line 1;

Page 17654; line 25;

Page 17655; lines 1, 3, and 4;

22286 17656, line 3 through line 17;

17656, lines 22 through 24;

Page 17657, lines 16 through 18;

17657, line 23;

17660, lines 13 to 16, inclusive;

17663, lines 14 to 16, inclusive;

Page 17663, again, lines 19 through and including line 25;

17665, line 6 through line 11; and line 17 through line 20;

Page 17694, lines 5 through line 14;

17694, lines 19 through line 21;

Page 17695, lines 1 through line 3; and lines 9 through line 14;

17696, lines 4, 5, and 6;

17699, lines 12 through 17;

Page 17700, lines 23, 24, and 25;

17701, lines 1, 2, and 3;

Page 17704, lines 4 and 9 through line 11; and line 25;

17705, lines 1 through line 3;

17716, lines 3 and 4, and lines 22 to line 25;

17717, lines 1 through line 5;
17735, lines 7 and 8 through line 25;
17736, line 1 through line 6;
22287 17750, line 18 through line 25;
17751, lines 1, 2, and 3; and then
Page 18527, line 4 through line 7;
18528, line 11 through line 19, and also line 24;
18529, line 22 on through to 25, inclusive; and on
Page 18530, lines 1 to 6, inclusive; and
18531, lines 5 and 6, and lines 21, 22, and 23.

Now, I also desire and do now renew the motion to strike appearing on page 18312 and 18315 of the transcript record specifying the pages and line references as to Dr. Fetter, which have reference to the steel industry. I undertook to cross-examine Dr. Fetter tending to show the distinction between the practices or pricing methods in the steel industry and the pricing methods in the cement industry, to both of which Dr. Fetter had adverted as being basing-point systems. Your Honor denied my right to continue that examination upon the objection of Mr. Wooden that it was not proper to go into that subject, and I then moved to strike out all the matter relating to the steel industry, and Your Honor said, beginning at the bottom of page 18315:

"I am inclined to think that I shall allow it."

22288 I did undertake to be more specific about it, and in that regard I do call attention to the beginning of Dr. Fetter's direct examination, when, as a part of his qualifications, it was developed that he had published a book called "The Masquerade of Monopoly," dealing largely with the basing point problem. And then he also told us of his being retained to cooperate with Professor Ripley in the Pittsburgh basing point case, in 1923, which appears in the last two lines on page 17636; and at 17637, Mr. Wooden asked him "Is the book that you referred to a while ago called 'A Masquerade of Monopoly?' Did that deal particularly with the basing point system of pricing?" And he answered: "That is the essential theme of the book, and the meaning of the title is not a mere play on words; it is a literal description of what I felt to have been the experience with the basing point; that it had successfully eluded discovery and deceived the public and the country as to its nature."

What I have read appears on page 17637 of the record

lines 6 to 13, inclusive. And subsequent to the completion of my cross-examination of Dr. Fetter, "The Masquerade of Monopoly," the book referred to, was offered and over objection received in evidence. I believe it was designated as Commission's Exhibit 2921.

22289 An examination of that book discloses that it is based very largely upon reference to litigation in which the Steel Corporation, I believe, the United States Steel Corporation was the principal party, and to a discussion of the pricing methods used by the Steel Corporation and the steel companies referred to as the basing point system. And in the book it is also inferred by or literally stated by Dr. Fetter that the prices and the pricing methods or marketing methods in the steel industry are the same as those used in the cement industry.

Now, of course, to be deprived of the right to cross-examine, to bring out the distinction between those two systems under the situation where that book is in evidence, and where Mr. Wooden had asked him on direct examination about it—it emphasizes the importance of the point of being allowed to cross-examine him on that, and I think that in view of the fact that the book had itself been later offered and received in evidence, that—

Trial Examiner Norwood: It was received on the subject of bias of the witness, as I understand it.

Mr. Zimmerman: I understand, and I have reread the transcript in that regard, but it is apparent from the answers made by Dr. Fetter in so far as I did ask

22290 him any questions at all, beginning on page 18303, and I believe running through to 18308, that he was under the impression that his testimony with reference to the matter of pricing methods used in the cement industry indicated that he was under the impression and based his answers largely upon the idea that the two pricing methods, that is to say, those used in the steel industry and those used in the cement industry were substantially the same. I think, therefore, since your Honor felt that that was not the proper subject of cross-examination under Mr. Wooden's objection, that we should, and I now do move to strike out Dr. Fetter's entire testimony, not limiting it now to the specific lines and pages, because I think in view of the situation that has since developed, it is apparent that his entire line of testimony is so interwoven and so based upon his ideas with reference to the similar-

ity as to the marketing methods in the two industries, that it is completely bad, and I also move to strike from the record the Exhibit 2921, that is to say, I move to strike "The Masquerade of Monopoly."

I think that concludes my motions and points up to the lines and pages as I agreed with Your Honor I would do.

Trial Examiner Norwood: Well, I will rule on 22291 that when I can look at the record here.

Mr. Shefelman: Will you mark this, please?

(Thereupon a certain document was marked Respondents' Exhibit No. 393, for identification.)

Mr. Shefelman: If it please Your Honor, under the agreement that has heretofore been made with other Counsel with reference to their objections and motions which have been filed, I have just had marked as Respondents' Exhibit 393, for identification, the objections and motions filed on behalf of the Northwestern Portland Cement Company, with the understanding as was made with other Counsel, that the motion and the list of exhibits and testimony, Schedules "A" and "B", shall be deemed all read into the record and made orally; and I am, likewise, at this moment, handing to Mr. Wooden, Counsel for the Commission, a copy of a motion just marked for identification.

I shall not try to repeat the argument made by others, and, in particular, Mr. Little. I do, however, wish to adopt as my own and incorporate in my own motion the objections and motions made by other Counsel for the companies and deem them all made on behalf of the Northwestern Portland Cement Company, and deem their arguments likewise advanced in support of ourselves.

22292 As I stated, our motions and our objections are quite similar to those made by Mr. Little on behalf of the Superior Portland Cement Company and the extensive statement made by Mr. Little made so clearly and persuasively applies with equal, and perhaps even greater force to the situation of the Northwestern Portland Cement Company. I have combed the record in detail to find testimony which purportedly ties the Northwestern Portland Cement Company in this case, and not claiming to have had the broadest experience in the trial of cases before either courts or administrative bodies, of course, yet from my rather meager experience I can say with definiteness and certainty that there is scarcely a thing in the record that ties the Northwestern Portland Cement

Company is, which translated in terms of our motion, means that Your Honor should, if Your Honor sees fit not to strike the testimony, at least, limit it so that it will not in any wise affect the Northwestern Portland Cement Company.

The record shows, in connecion with these motions, that this is a one-kiln plant with a comparatively small capacity, selling in a small territory, all within the boundaries of the State of Washington, and they haven't sold anything out of the State in 10 years.

The hypothetical questions put to these experts can't by any stretch of the imagination be deemed based
22293 upon facts, and I say not all facts, but taking a few of the facts which apply to the Northwestern. Therefore, they certainly should be stricken; otherwise, as Mr. Little pointed out on behalf of the Superior, here I am representing a very small institution required to follow these proceedings around for the next year. Now, I will concede that if this were a normal lawsuit where Your Honor could say to me, "We will proceed with Your evidence, Mr. Shefelman, and at the end of the trial I will rule because it is a matter of two days or a week," there might be some justification for such a position, but I think it is the duty of Your Honor, sitting as an examiner here where the consequences are so real, and the Federal Trade Commission and Your Honor, representing the Commission in your capacity as Examiner, has not only the interest of the prosecution of these companies, but should have the interest of each litigant in mind, and, having that in mind, and since I believe the record shows conclusively that no material testimony affects the Northwestern Portland Cement Company, I think it your duty to rule that the testimony is limited so as not to affect our company, so as not to require that we be put under an oppressive economic burden in this matter in trying to follow this around, which, in my judgment, amounts to noth-
ing but repriving us of due process of law, if we are
22294 required to follow this for a year or a year and a half longer.

Now, I am not going to argue the specific items, because Mr. Little covered them admirably. The testimony doesn't apply to us. I challenge anybody to go through this record and compile anything that shows that we conspired with these companies. There isn't any direct testimony, or

indirect, of any conspiracy on our part, and if Mr. Paulson's position is that this is a conspiracy case, we have not been tied in.

If it is based upon certain alleged practices, we haven't engaged in them. We don't know what the freight rate books are. Why do we need these things? The very fact that we confine ourselves, because of our small capacity, to this small territory, means we just naturally have no interest in the things that are alleged to exist. Whether they exist, or not, for other companies, it is not for me to argue. I can't see that they exist at all in this case, but, certainly, as far as we are concerned, they do not exist.

Trial Examiner Norwood: Does not Northwestern ship out of the State?

Mr. Shefelman: We have not shipped a barrel of cement outside of the State of Washington since the year 1929. We have not bid on anything outside of the State of Washington since the year 1929. Our plant began 22295 operation in 1928, and, as the record shows very clearly, there were one or two little shipments, I think, outside of the State, and the company soon realized, with its small capacity and the surrounding territory, that it was just inadvisable to do it, and they haven't engaged in interstate commerce in any form in 10 years. They haven't bid outside, or shipped out, and, as I say, as I go through this thing, I think it is a rank injustice to put this company to the expense of sending Counsel here to argue these matters, or to follow this around.

Let's assume that Counsel had some suspicion in their minds, or whoever drew this complaint had some suspicions in their minds that warranted them in joining us at the outset. Certainly out of a clear conscience they should confess by this time that their suspicions were unfounded in so far as we are concerned. And so, again, without taking up the time of the Court, because I realize Your Honor wishes the argument curtailed, I say there isn't anything in this case, as far as we are concerned, and I think it is the duty of Your Honor to rule specifically on each of our motions that we have made.

Trial Examiner Norwood: Did your company belong to the Institute?

Mr. Shefelman: The record shows that we joined the Institute, and I don't think we ever received any- 22296 thing, participated, or had anything to do. We

don't know anything about the Institute, and I think the record bears me out on that.

Trial Examiner Norwood: Well, do the schedules and the exhibits show that your company was involved in the identical bidding?

Mr. Shefelman: There is the identical bid, I think, during the N.R.A. period.

Mr. Little: And on the Grand Coulee, the first Grand Coulee.

Mr. Shefelman: The first Grand Coulee some years ago, during that so-called twilight zone, but otherwise I—

Mr. MacIntyre: Mr. Shefelman—

Trial Examiner Norwood: Wait a moment. Let him finish.

Mr. MacIntyre: May I ask you a question so that if you would care to answer it, it would give the Examiner something—

Mr. Shefelman: Just a moment, Mr. MacIntyre. In view of the unfair question you propounded to Counsel, Mr. Little, who was kind enough and courteous enough to yield the floor for a proper question, I think I will prefer that you just argue your matter. You will forgive me.

You have been very courteous to me, personally, but
22297 in view of what transpired previously, I think you have no right to do that.

So that coming back to these motions, if this were a court law applying any rule, and this body applies the rules of administrative bodies, I think Your Honor should grant our motion to strike all of this testimony, limit it, and not apply it to us, and I think we shall rest at that point; that is, so far as this argument is concerned.

Mr. Little: I merely want to add one word, if Your Honor please. I want to make it clear that in the objections and motions to strike and limit which I made, we are throughout preserving our objection to the jurisdiction of the Federal Trade Commission on the ground that the Superior Portland Cement, Inc., in the first place, does not engage in interstate commerce, because it has never sold any cement since, I think it was—

Trial Examiner Norwood: Counsel discussed that.

Mr. Little: In one or two instances, but never sold any cement.

Trial Examiner Norwood: Counsel gave us the figures on that.

Mr. Little: F.o.b. mill outside the State, and even such shipments which are sold f.o.b. Seattle, which is the mill of the Superior Portland Cement, Inc., and which are taken by third parties, dealers and Government bidders
22298 by their own carriers to Alaska, it only amounts to a mere trifle, approximately one percent of the total production of the Superior, and we are not involved on how it is sold in Alaska, or how it is used, or how it is handled. So that the Federal Trade Commission could not be concerned with anything Superior Portland Cement does. It is clearly and solely engaged in intrastate commerce, and the mere trifle of one percent, concerning which there is no evidence in the case at all, none at all as to the trade practices on the sale of cement by dealers in Alaska, who are independent bodies, as the record shows—

Trial Examiner Norwood: Your company is in competition with companies that are in interstate commerce?

Mr. Little: Well, we have bid against Oregon companies. The record is clear that there have been several bidders in Government bidding. Merely because you are in competition with someone who is engaged in interstate commerce doesn't subject you to the jurisdiction of the Federal Trade Commission unless you can show affirmatively that there is conspiracy. This isn't a matter of the Interstate Commerce Commission hearing on rates.
22299 It isn't a matter involving—and, for that matter, the Interstate Commerce Commission doesn't have jurisdiction over purely intra-state rates, so the analogy there wouldn't even apply. This is a question as to whether this is a conspiracy, and there is none, and there is none shown. Therefore, I want it to be clearly understood that Superior, as the Northwestern Portland Cement Company, now does and at all times through the hearing did object on the ground that it is not engaged in interstate commerce, and I would like to call Your Honor's attention to the statement in the so-called White Book, in the preface to it, in which it is acknowledged that the Federal Trade Commission does not have jurisdiction over sales in intra-state commerce.

Mr. Smith: Would Your Honor care to hear from me tonight or tomorrow morning?

Trial Examiner Norwood: How long will the Counsel want?

Mr. Smith: What time do you usually adjourn?

Trial Examiner Norwood: Oh, in 10 or 15 minutes from now.

Mr. Smith: I might keep you a little longer than that.

Trial Examiner Norwood: Well, go ahead. You can go ahead a little while.

22300 Mr. Smith: On behalf of the Huron Portland Cement Company, I desire to move that the Examiner strike, or, so far as the Huron is concerned, eliminate from consideration so far as Huron is concerned the testimony of the economic experts, Dr. Duddey, Hibbard, Fetter, and Viner. That testimony is found at the following pages of the record: Dr. Duddey at 15258 to 15360, 15367 to 15413. The witness Hibbard, from 15576 to 15604, 15413 to 15532. Dr. Fetter, 17634 to 17690, 17693 to 17816, 17833 to 17960, 17973 to 18085, 18094 to 18200, 18214 to 18353, 18509 to 18583. Dr. Viner at 15619, 15741, 15744, 16901 to—15744 to 16901, 15906 to 16045.

I think it is fair to say that my objection and motion is directed particularly to the hypothetical questions which were asked of those witnesses, but I find it impossible to segregate line by line out of their testimony any of their testimony that does not in some way relate to the hypothetical questions, and it is in those questions that the vice of which I complain is found. I make that motion upon the premise that the undisputed testimony as far as it relates to Respondent Huron Portland Cement Company completely negatives the essentials of those questions and the premises upon which the questions are founded and the statements of assumptions included in them.

22301 And if Your Honor—

Trial Examiner Norwood: That is, in so far as they may be applied to Huron?

Mr. Smith: So far as they may be applied to Huron. Your Honor will remember those questions. They proceed upon the assumption that the cement companies make delivered prices. They have references in them to the basing point system. I do not recall whether they particularly go into the details of the complaint of the Government, such as the opposition to trucks, but that all has a part of the picture that was painted for the experts upon which their questions were asked.

Now, first, in so far as those questions imply an understanding or an agreement as to uniform prices, the proof negatives the fact that at any time the Huron had

at any time any mutual understanding or agreement as has been defined and described in the paragraphs 5 to 7 of the complaint. We are not left an inference in that respect. Mr. Crapo was upon the stand for the Government, and he negatived that as a Government witness. The strongest, I think that the Government could claim for any testimony in that respect was the testimony of the witness MacIntyre in respect to a certain time when certain other cement men visited Detroit, but Mr. MacIntyre
22302 refused to say that Mr. Crapo at that time admitted that there had been any understanding in reference to prices whatever. Mr. Crapo, curiously enough, was not interrogated on that question when he was on the stand.

So far as the general proof, the proof as to the general proposition of any understanding whatever, there is none, and I think none will be claimed of a direct agreement or understanding. I am taking up the matter in the sequence of which it appears in the complaint. Under paragraph 5 of the complaint, there is a charge that the Respondents by agreement or understanding used the so-called multiple basing point system. The evidence not only is not in doubt so far as the Huron is concerned upon that point, it is specific and clear that it has at no time used the basing point system. For instance, for a year and four months in 1937 and 1938, its Michigan prices were made without any reference to basing points, a flat price all over the State of Michigan. And in response to the interrogations of Government Counsel Mr. Crapo stated, and they let it stand at that, that the prices that were made at its different plants upon the Great Lakes were all made by Huron with entire independence without any reference to the prices of other companies.

22303 In that same connection, the complaint talks about the delivered prices. We are left no doubt so far as Huron's practices on delivered prices are concerned, and here, of course, we touch upon a fundamental of the questions that were asked of the economic experts. Huron, for all time, has made both delivered and plant prices; at several places in the record it is made clear that the Huron gives an option of a plant or a delivered price, whichever the customer desires. So far as the Government is concerned, the evidence is explicit that it sells at its Alpena plant to the lighthouse service at a plant price.

You will recall that in the complaint there is a list of

examples, the first one of which is Fort Peck, upon a sale to Fort Peck of 605,000 barrels by the Huron Portland Cement Company on a so-called emergency contract. The sale was at the Duluth plant, delivery taken there, and Mr. Wooden interrogated Mr. Crapo as to the quantity of cement, not specified in the record, which the Huron sold to the Government in the spring of 1938, and the testimony is undisputed that that was all sold at plant prices. There is no evidence in the record that any sale was made by the Government at any time whatsoever at a delivered price. It is all at the plant price.

In that connection, of course, there has been much
22304 discussion as to land grant rates. Upon that feature of the case, the evidence as to Huron is explicit. The only sale in the record in which land grant rates arise was the Fort Peck sale, and there Huron gave the Government the benefit of the land grant rate, taking the cement at Duluth and shipping it on those very rates.

Now coming to the question of trucking, which it is alleged is a menace, as I think the complaint uses the word, that that is regarded by the combination as a menace to the price situation. The evidence is undisputed and explicit that at every single one of its plants, the Huron Portland Cement Company has for years employed truck delivery, and that truck deliveries are made at the option of the purchaser.

In its Detroit operation, at its Detroit plant, 98 and a fraction percent of its cement is sold by truck, and upwards of 50 percent everywhere is sold by truck.

Trial Examiner Norwood: Did they make an additional charge for truck delivery?

Mr. Smith: For a short period, I think the record shows, in Oswego, before they had completed their plant, in order to get the trucks in operation, they penalized truck delivery by a five-cent addition, but outside of that they did not make an additional charge anywhere. And the
customer of the Huron, according to the record
22305 today, can back his truck up and take it away from the plant without any additional charge.

Now, there is no dispute about that, and that is testimony of the Government's witnesses, our officials, but Government witnesses.

Mr. Wooden: Of course, this is all argument, Your Honor.

Mr. Smith: It is all argument upon our motion.

Upon the points as to the uniform prices, it is interesting to note that the Government, under a subpoena duces tecum, required the Huron, with the other companies, to produce the invoices of their sales at certain specified points for the month of April, 1938, and an inspection of those invoices will disclose a large number of sales where delivery was by truck, and a large number of sales where the price was a plant price, as I recall.

For instance, invoices in Superior, Wis., where delivery was made from the Duluth plant where it was sold at the Duluth price, delivery was by truck. All the sales in Alpena were plant prices and were delivered by truck, and, as I said, 98 percent of those in Detroit were of that character.

I am now going back to the question of whether Huron was in any agreement or combination, and I find it difficult to limit my remarks strictly to the details of the
22306 testimony of the experts, but it all ties in together.

There is an assertion that the various companies employed the Institute for the determination of its policies. There is no evidence in the record in any way whatsoever connecting the Huron with that charge. The correspondence between Mr. Crapo and Mr. Affleck, of course, negatives that, for in that correspondence Mr. Crapo called Mr. Affleck's—stated to Mr. Affleck that there was no high court in the Institute to deal with the problems of competition that he was interested in at that time. There is no evidence that the Huron at any time participated, adopted practices, forms, sales blanks, order blanks, as stipulated by the Institute or by any other mill. There is no evidence that we prevented in any way differences in costs from being reflected between true competitive prices. There is no testimony that we eliminated in any way the natural advantages of local buyers contrary to normal economical conditions. The evidence is conclusive that the Huron Portland Cement, with its principal mill located at Alpena, on the source of its raw material, upon the water of the Great Lakes, has availed itself of the most economical methods of transportation, and is aggressively pushing its cement to all of the ports on the Great Lakes, making use of the most economical means of distribution, including trucks, establishing its ware-
22307 houses and its supplementary plants at nine other

plants, and that each point and in each territory has aggressively pushed its competition with every other company in the industry, and that in that competitive effort, it uses in every respect the direct antithesis of the practices that have been charged in the complaint.

I desire, therefore, that the Examiner eliminate from consideration the testimony of the experts so far as the Huron Portland Cement Company is concerned. I desire to state upon the record that I am moving the Commission to dismiss count 1 of the complaint, and that it be dismissed as to the Respondent Huron for the reason that the proofs of the complainant do not sustain as against that Respondent any of the charges set forth in count 1 of that complaint.

I am making that motion, reserving, of course, all rights of defense and any other or further defense that may seem desirable to the Respondent Huron. That motion is based on the records and files in the cause and on the specific statement of the grounds and reasons which I have attached thereto, and in which I have analyzed, all the proofs that I can find in the record so far as the Huron Portland Cement is concerned, under each specific paragraph of the complaint.

I assume that that motion is directed more prop-
22308 erly to the Commission, itself. I will be glad if Your Honor would consider it.

Trial Examiner Norwood: Well, your first motion is to restrict the expert testimony; that is, to rule that it does not apply.

Mr. Smith: To rule that it does not apply to Huron.

Trial Examiner Norwood: Because the conditions were not shown to obtain with respect to Huron?

Mr. Smith: Yes.

Trial Examiner Norwood: And your second motion is that the case be dismissed with respect to Huron?

Mr. Smith: So far as count 1 of the complaint is concerned.

Trial Examiner Norwood: Well, I can state that I have no authority to dismiss the case. It requires a majority vote of the Commission, three Commissioners, to dismiss it, so I shall deny that motion now with that explanation, without prejudice. Counsel may take it before the Commission.

As for striking the testimony, I will reserve that until tomorrow; that is, restricting the testimony.

Mr. Smith: Well, as to restricting the testimony, let me add this: In any view of the testimony, and from the status of the record, if Your Honor should conclude that the testimony of the experts should be elim-
22309 inated from consideration, when it comes to the case of the Respondent Huron, there would then be nothing left in the case upon which a cease and desist order could rest against Huron. I say that with full knowledge that it is the contention of the Government that mere membership in the Institute would be enough to bind the Huron, and I do not desire to be heard at this time at length on that. Perhaps that more properly ought to be heard before the Commission on the motion to dismiss there. But let me observe this, that the record is barren of any testimony to indicate that the Institute in its inception, by its articles and its by-laws, its articles of association, had any illegal intent whatsoever. Before the Respondent Huron, because it joined a legal organization, can be held to have become a party to a combination, it must be established that there was some other wrongful agreement, and that Huron participated in that wrongful agreement either by being a party to the agreement itself or participating in its activities with knowledge of their illegal purpose.

Now, Your Honor has perhaps already observed that the complaint does not charge that the Institute is the agreement and combination that is being challenged here. It is obvious that that agreement and combination the Government expects to derive from the acts of certain cement producers who in this instance happen to be members of the Institute. Before any of those
22310 acts whatever can be used by the law to condemn the Huron Portland Cement Company, the Huron must have been proven to have had some part in those activities. The record is not in that respect, as I have said, in any respect negative. It is affirmative. And the Government by its own testimony has eliminated from the case, or demonstrated that the Huron Portland Cement Company had no part whatever in those activities. So I contend that upon the record as a whole, whether the testimony of the economic experts goes out or not, there is no proof against Huron, but certainly if it does go out no

trace of any evidence against my client remains on the record in any respect whatsoever.

Trial Examiner Norwood: Have you had your motion marked? Didn't you want to file that?

Mr. Smith: No, I intend to submit it orally to Your Honor. I have listed these pages.

Now, the only thing that I would like to inquire of Your Honor, is it necessary that I put upon the record the precise pages of these hypothetical questions? I have not done so.

Trial Examiner Norwood: Oh, I don't think so, no. You have designated the witnesses and the pages of their testimony.

Mr. Smith: I am filing my motion to dismiss
22311 with the Commission. I understand that will be the place.

Mr. Leisure: If Your Honor pleases, after we had tendered our motions and while other Counsel were arguing their motions, Counsel for the Commission stated that, in effect, where we failed to make any objections we had thereby waived our rights to make motions at this time. Our position on that very briefly is that it seems to us clear that the right is reserved to us in the record to make these motions, and, also—

Trial Examiner Norwood: I will hear Counsel on that tomorrow. It is adjourning time.

Mr. Leisure: Very good, sir.

Mr. Wooden: Might I make one statement, Your Honor, that will clear up a matter that has been pending?

Trial Examiner Norwood: Yes.

Mr. Zimmerman: Before you do finally adjourn, I would like to say just a word because of my absence tomorrow, that is all.

Trial Examiner Norwood: You have about three minutes for all of it. Go ahead, Mr. Wooden.

Mr. Wooden: With regard to Respondents' Exhibits, for identification, 210, 211, and 382, consisting of certain freight tariffs and certification of the Interstate Commerce Commission, and a letter withdrawing the certification as being incorrected, I am now willing to have the
22312 record show that those exhibits may be withdrawn in so far as they were received in evidence by Respondents' Counsel, subject to this condition: That if it should become apparent that the documents referred to

in any way are material in the way of rebuttal, that we then have the privilege of reviving those documents, or using them.

Trial Examiner Norwood: Introducing them in your case?

Mr. Wooden: That is right.

Trial Examiner Norwood: Let the record show, then, that Respondents' Exhibits 210, 211, and 382 are withdrawn.

(The documents referred, being Respondents' Exhibits 210, 211, and 382, were withdrawn from the record.)

Trial Examiner Norwood: I will hear Mr. Zimmerman.

Mr. Zimmerman: Inasmuch as it will not be possible for me to be here tomorrow on account of the court engagement in Cook County, Illinois, my intention being to go and argue that case there and make every possible effort to get back here by Friday morning, I would just like to say to Your Honor that I think it would be proper for you to grant me permission to make my motions, or to join in any motions or objections or any proceedings that are had upon my return nunc pro tunc, as of tomorrow, the same as if I were here tomorrow.

22313 Trial Examiner Norwood: I think that should be done, yes.

Mr. Zimmerman: Thank you very much.

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June 23, 1939.

22428 Mr. Zimmerman: Well, I had no motion to offer, nothing more to say except that I did want the record to show that as to motions to strike and all motions or all objections to testimony and exhibits shall be joined in by Marquette. As Your Honor indicated, it would not be proper under your practice, I take it, to make a motion to dismiss before Your Honor. That would be purely pro forma so far as you are concerned, and that should be presented to the Commission if and when we have reached that point.

Trial Examiner Norwood: I understand that Counsel are going to make those motions after I have ruled on their motions relating to the testimony; that is, they go on

the record as made at this time and then I shall refer them to the Commission.

Mr. Zimmerman: Well, I recall in Your Honor's little work—perhaps I shouldn't say "little work." It is quite a compendium with reference to practice here.

22429 Your Honor makes a statement that such motions to dismiss should not be made before Your Honor.

Trial Examiner Norwood: No, I didn't say that.

Mr. Zimmerman: Well, you said—let me just turn to it and refresh my recollection on it.

Trial Examiner Norwood: No use making a point of that. I said, in substance, that the Examiner had no authority to allow motions to dismiss, that they could only be made by a majority vote of the Commission.

Mr. Zimmerman: Yes.

Trial Examiner Norwood: And that those motions are always denied, but go ahead and cite it.

Mr. Zimmerman: I don't think anybody would require us to do a vain thing and if those motions are always denied by the Examiner it would hardly be worth while to present them here.

Trial Examiner Norwood: There is no requirement to make them here. That is just entirely a matter for the Counsel to decide.

In the matter of the pending motions to limit testimony, to strike testimony, and to withdraw exhibits, I wish to say that although they are voluminous, consisting of more than 2,000 pages and many pages of the record, I have examined and considered each motion sufficiently to render clear the course I deem it my duty to pursue with

22430 regard to them. I have not checked each and every list of exhibits or each and every line of the testimony cited, which list and citations cover the greater part of the pages. But the classification and description of these, as contained in the motions and in the arguments, and my examination of some of the exhibits and testimony proposed to be invalidated, have been sufficient to inform me fully.

These many and particular motions and objections, much of which is a repetition of what has been offered before, are extremely interesting. They reveal an insistent effort on the part of Respondents to force court procedure on an administrative body accustomed to function by what I believe to be a more thorough and liberal

method. There is a clash here between two systems—just as there was when equity came into being. Administrative procedure was devised for the purpose of bringing out facts and safeguarding rights in a simple, direct process compatible with fundamental principles of justice and the laws covering the reception of evidence, but with a freedom from technical application of the letter of the law where such application departs from these fundamental principles, defeats their objectives, and serves only the purposes of obstruction and confusion. It seems to me that the administrative procedure is being developed in
a way that enables us to produce the very desirable
22431 ends for which it was instituted. Meticulous restrictions on the receipt of evidence grew out of the limitations of the jurors, but there are no juries here. This material we are receiving is considered by a body of experts and it is studied and weighed with a thoroughness that is entirely impracticable and impossible for a jury to employ.

Notwithstanding this difference of method, and the absence of reasons for meticulous exclusion, counsel for the Respondents are insisting upon it to an extent far in excess of what they would be conceded even in a jury trial in a court of law. And, I will observe by way of digression, it is now the desire of some portions of the American bar to defeat this liberal movement for the promotion of efficiency and justice by hampering quasi-judicial administrative agencies with more technical rules and procedure. These men, whose sincerity is not here questioned but whose reasoning appears to me to be extremely bad, seem to think stringent rules can take the place of wisdom and judicial approach. From the beginnings of society rules have been made in the vain effort to enable fools to act like wise men and fanatics to hold evenly the balances of justice; but experience teaches us that these laudable ends cannot be accomplished in this way, and that stringent
rules usually punish the innocent along with the
22432 guilty, which result is the first test of a bad rule or
a bad law. Stringent rules even permit the guilty to escape while punishing the innocent.

I think the effective remedy for much that is urged against the administrative procedure generally is not the adoption of more rules, and the placing of independent judicial officers under, as well as over, these responsible

commissions and agencies. The remedy, as indicated by Mr. Chief Justice Hughes and Attorney General Murphy, lies in continual vigilance in the employment of experienced and judicially minded men to preside over these proceedings. You cannot rule wisdom and experience into those who have it not. These commissions are responsible for results. After all, they are the juries, and if the men appointed to hold hearings are made to realize, as the Federal Trade Commission has insisted on advising them, that their highest duty is to help the Commission in the avoidance of unjust and unwarranted appraisal of facts and unwise conclusions, then these officers cannot, as Shakespeare expresses it, "be false to any man"—they cannot, a priori, be false to any respondent. This digression is made because of the fact that many in the profession do not seem disposed to discriminate between proceedings that are fairly conducted and those which are not. They also lose sight of the fact that the courts do not hesitate to
22433 relieve against arbitrary findings and the arbitrary exercise of power. I could cite several cases right on that point.

Now finally as to the motions before us, all of the matter objected to has been considered as to its competency and it has been heretofore received in evidence. Many of these objections are beside the points involved in their prior reception and beside the points which in my opinion should influence me in again passing upon them, but I am asked to consider them on the additional point of whether or not they have been sufficiently connected in the record to justify their consideration as bases for findings. It is my opinion that all evidence heretofore received, the application of which is conditioned on a prima facie case of expressed or implied agreement or concerted activities to restrain trade, should remain in the record. That is, I hold, as heretofore, that such prima facie case has been made out. The objections going to lack of identification, irrelevancy, incompetency and immateriality, are not well taken, and my position as to these appears throughout the record. Objections going to alleged failure to secure documents and to the alleged abridgement of the right of cross-examination have not the slightest substance, as these Respondents have exercised that right with respect
22434 to all witnesses and to an unusual degree as to some. It is my opinion that there is sufficient evi-

dence in the record and the exhibits to establish a prima facie connection between Respondents Northwestern Portland Cement Company, Superior Portland Cement Company and Huron Portland Cement Company, to justify the denial of their respective motions to exclude them from the application of the expert testimony cited in their motions.

Generally, it is clear to me that all the motions now before me to withdraw exhibits, to strike testimony, and to limit the application of testimony should and must be denied. To allow them would be a distortion of the rules of evidence which would render the Government impotent to correct any of the trade evils inhibited by law. These motions and objections are hereby denied, and the Respondents may now go forward with their proof to the end that the truth may prevail and that the constructive course of this great industry may be aided and stimulated. It is only by bringing out all of the salient facts that we can contribute to this happy desideratum.

Mr. Leisure: Your Honor will note on the record our exceptions to Your Honor's ruling, and when I say "to Your Honor's ruling," I mean to each and every ruling contained in the general statement.

I would like to point out, also, we have made no
22435 motion to withdraw any exhibits; our motions have been to strike and to limit.

We will want to take this up as speedily as possible with the Commission.

Trial Examiner Norwood: Yes.

Mr. Shefelman: Of course we join in the same statement, and will Your Honor forgive me if I make this observation, so that my position can be perfectly clear: First, Your Honor states in your ruling that your position as to the materiality and relevancy appears throughout the record. Until we made these motions that question did not appear in the record because our right to make these motions to strike and limit came at the very end, so this is the first time Your Honor's position was made clear, with reference to us.

Trial Examiner Norwood: I think it is very clear that I applied that to the majority of these motions before me as contained in this 22,000 pages of record, and 2,500 pages of motions, and the ruling is made as of this time regardless of anything I have said heretofore.

Mr. Little: I want to join in taking an exception to Your Honor's ruling.

Trial Examiner Norwood: Yes, all Respondents have their exceptions to this ruling.

Mr. Little: I merely want to add, if Your Honor
22436 please, that I feel in making this ruling Your Honor has not, perhaps, given as much weight and given as much consideration to the arguments which were made on behalf of the Pacific Northwest Respondents with reference to the fact that there is no evidence whatever to connect us up, no overt acts under the charges in the complaint, and I feel that if Your Honor had the time to give further consideration to the question of the expert witnesses alone—I just cite that as one example—he would realize that by not limiting that testimony so that it wouldn't apply to the Pacific Northwest companies, Your Honor is putting a very real burden on them, and I feel it is improper for Your Honor not to limit that testimony as well as a great deal of other testimony which you pointed out, and I do want to take exception.

Trial Examiner Norwood: I am not placing a burden on anybody. I just have a duty to do here with respect to these rulings, and I did not have to weigh this evidence, and I don't predict the final results of this as to whether or not this case will be dismissed as to any of the Respondents here. All I had to do was to find out whether there was some evidence in the record to connect these companies in one way or another on all the points alleged.

Mr. Leisure: From what Your Honor just said to Mr.
22437 Shefelman with respect to all other Respondents, I take it that it is clear on the record that Your Honor's ruling denies each and every motion to strike and to limit, and that each individual Respondent has the benefit of any exception which I have stated to that ruling.

Trial Examiner Norwood: Yes, that is the understanding. It also includes the motion of Counsel for Marquette, as appears on page 18220, and renewed on pages 18312 to 18315 and on pages 22284 to 22290.

22438 Mr. Shefelman: If the Court please, may I, with Your Honor's permission, give way to an irresistible impulse? Your Honor spoke of the position of the American bar with reference to attempting to pass certain rules that would tie the hands of administrative bodies. I happen to be a member of the House of Delegates, the ad-

ministrative body of the American Bar Association. I think Your Honor misunderstands the purpose of the American Bar's position. I happen to have sat through—

Trial Examiner Norwood: I was not speaking about the American bar especially. I said some portions—

Mr. Shefelman: I assume Your Honor had reference to the bill which is now—

Trial Examiner Norwood: Of some American lawyers.

Mr. Shefelman: I thought Your Honor had reference to the administrative law bill now pending before Congress.

Trial Examiner Norwood: No.

Mr. Shefelman: Which we prepared and presented.

Trial Examiner Norwood: No. In my opinion, there are many good points in that. I want to approach that subject—it is a big subject—from a constructive attitude, and I think that you have some able men on those committees.

Mr. Shefelman: Well, having sat for days—

Trial Examiner Norwood: One of them is John J. 22439 Parker.

Mr. Shefelman: Having discussed this bill for days, and knowing the good points, I was rather shocked in Your Honor taking that position to the efforts with reference to that bill.

Trial Examiner Norwood: No. Nobody seems to realize that there is a constructive side to be advanced by the administrative body. In other words, if the laws we have in that respect, and in many others, are carried out, we wouldn't need new rules or new laws—are properly carried out.

Mr. McFadden: Your Honor, the reason we sit in silence is because we agree with that general principle, that the administrative bodies are desirable and necessary; but that in handling alleged violations of these increasing number of statutes which convey upon the administrative the right to make findings of fact which, if supported by evidence, shall be conclusive, there is an increasing obligation upon those who are connected with the administrative bodies to be sure that these bodies are protected by the proper application of judicial principles. And so our motions here have not been made on any technical grounds but because we feel that the issue here is much more important than the decision of this particular case. The

issue here is whether or not the hearing here shall
22440 be what the Constitution intended by a full and fair hearing.

Trial Examiner Norwood: I agree with the Counsel about the responsibility of coming to proper or coming to just and true and proper findings and conclusions, and you will find that where there are arbitrary findings and arbitrary conclusions, the courts haven't hesitated to upset them.

Mr. Wooden: I would just like to say, Your Honor, that I for one appreciate very much the efforts of Respondents' Counsel to protect the Commission against committing any grievous error which would have the result of possibly winning Respondents' case for them.

Trial Examiner Norwood: Well, I think we have all tried to do the same thing here. After all, our efforts are constructive.

Anything further?

Mr. Leisure: We would like to prepare our appeal to the Commission and we will do it as quickly as we can.

22441 Mr. Leisure: If Your Honor please, I have just talked with associate counsel. It will be necessary for us to prepare motion papers to be filed and become a part of the record, and anything that we would be able to do today would run over into tomorrow, so I suggest that we adjourn now as we ordinarily do adjourn on Friday until Tuesday morning and we will, in the meantime, ask the Commission for a hearing just as soon as they will give it to us.

Mr. Zimmerman: I heartily join in that. I have spent three nights this week on the train getting back and forth, and I don't want to have to spend another one until next Monday night.

Mr. Wooden: I would just like to suggest, Your Honor that, formally speaking, the next step for Your Honor would be the presentation of evidence on behalf of Respondents.

Trial Examiner Norwood: That is correct.

Mr. Wooden: By Respondents. What Your Honor may wish to do in view of the notice given of motions to be filed with the Commission, that is, of course, for Your Honor to say.

Trial Examiner Norwood: Yes.

Mr. Wooden: I merely suggest that the next thing on

the program for you is Respondents' presentation of
22442 evidence.

Trial Examiner Norwood: I consider the request very reasonable to enable them to draw up these motions, and it is the understanding that Counsel will contact the Commission and be ready to put in their case, begin putting in their testimony Tuesday morning.

Mr. Leisure: Well, I can't enter into that understanding, Your Honor. I mean, that is an understanding—I don't know when the Commission is going to hear us, and I don't think we can safely go on until the Commission has ruled.

Trial Examiner Norwood: Well, we will know that.

Mr. Leisure: When we have finished with making motions before the Commission we will be prepared and ready to go on, when Your Honor sets the date; that is, within reasonable time for us to get witnesses after the Commission has ruled on our motion.

Trial Examiner Norwood: Well, Counsel can notify us just what the situation is on Tuesday morning.

Mr. Leisure: That is the best way, I think.

Trial Examiner Norwood: But I shall appear here to receive testimony on behalf of Respondents at our very next hearing, so this hearing is now adjourned to reconvene on Tuesday, June 27, at 10 o'clock a. m. in this room,
332, Office of the Federal Trade Commission, Wash-
22443 ington, D. C.

Mr. Leisure: I take it Your Honor understands from what I have said that we will not be prepared with witnesses Tuesday morning because we are going to go before the Commission on Tuesday, if possible.

Trial Examiner Norwood: Well, now, that all depends on what the Commission does and what you do. I am here Tuesday morning to receive testimony on behalf of the Respondents. If there is any reasonable requirement, why, we will consider it at the time. I think we should go on with it. In case you have your hearing Monday before the Commission, there is no reason why we shouldn't go on Tuesday morning with your testimony.

Mr. Leisure: We will be ready to go on just as soon as we can get witnesses after the Commission has ruled on all of our motions. We will not hesitate any after that.

22444 Washington, D. C.,
June 27, 1939.

22445 Proceedings.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on June 23d, the hearing in Docket 3167 is now reconvened at 10 o'clock a. m., June 27, 1939, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

22446 Trial Examiner Norwood: Has the Commission expressed the willingness to hear argument on that motion?

Mr. Leisure: I haven't heard from the Commission except through Mr. Wooden.

Mr. Wooden: I haven't heard from the Commission except through Mr. Kelley, and, later, the Secretary, to the effect that the Commission has decided to hear argument on the motion or petition of Respondents' Counsel, and has indicated Thursday morning at 10 o'clock as the time; and that was taken up with Respondents' Counsel, and is agreeable with them, as I understand.

22447 Trial Examiner Norwood: I think one of the Counsel for the Commission might go and communicate with the Secretary so we will know just what we are going to do.

Mr. Wooden: I said I had been in touch with the Secretary after talking with Mr. Kelley, and that the Secretary had told me the same thing.

Trial Examiner Norwood: There is no doubt, then, they are going to hear Respondents on the motions Thursday morning?

Mr. Wooden: The Secretary told me they were going to notify each Commissioner and formal notices were going out to the Respondents.

Mr. Leisure: They may be in the mail, then. We haven't received any notice yet except from Mr. Wooden.

Trial Examiner Norwood: What is your pleasure as to adjournment? I suppose we will adjourn until after the Commission—

Mr. Leisure: If we could adjourn until Friday morning, Your Honor, I think it would be the advisable thing.

Trial Examiner Norwood: Would you be ready to go on with some of your testimony on Friday?

Mr. Leisure: I just can't say until I know what the Commission does, I suppose. We have taken the position that as soon as the Commission rules on our motions we will be prepared to go on as soon as that is finished.

22448 Trial Examiner Norwood: Do you think the Commission will be prepared to rule the same day on your motions?

Mr. Leisure: I don't know.

22455 Washington, D. C.,
June 30, 1939.

22456 Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on June 27, the hearing in Docket 3167 is now reconvened in Room 332, Office of the Federal Trade Commission, at 10 o'clock a. m., on June 30.

22474 (COM. EXS. 1280-H to 1280-Q, both inclusive, were offered and received in evidence.)

22494 Trial Examiner Norwood: Now, we have had a good deal of pro and con about recess, and the Commission has not handed down any decision on the Respondents' motions after considering everybody's viewpoint.

I think we will have to take several weeks' recess. As a matter of fact, it would take me just about three months to catch up with the records and exhibits. I should like to do it before the Respondents go on with their testimony; so I think that we might as well recess until September 5th.

Mr. Wooden: I would like the record to show, your Honor, with reference to your viewpoint—and you no doubt have taken into consideration Counsel for the Commission's viewpoint,—I want the record to show

22495 that the extension to that date is without our consent and over our objection.

Trial Examiner Norwood: Yes.

Mr. McFadden: Your Honor, I note that the 5th of September is the day immediately following Labor Day. In view of the fact that some of the Counsel come a long distance, and it would be a great convenience for them not

to have to start traveling on Labor Day, would your Honor consider opening the hearing on the following day, Wednesday, instead of Tuesday of that week?

Trial Examiner Norwood: I will begin it now, if you want me to.

No, I think the 5th of September is the very last date, at 10 o'clock a. m., and if anybody is a few minutes' late it will be all right.

Mr. McFadden: To be heard in this room in Washington?

Trial Examiner Norwood: Yes.

The hearing will now be adjourned until 10 o'clock a. m., September 5, 1939, in Room 332, Office of the Federal Trade Commission, Washington, D. C., at which time the Respondents will be expected to begin to put in their testimony, if any. In the meantime you will have the decision of the Federal Trade Commission on your interlocutory appeal.

22496 Washington, D. C.,
September 5, 1939.

22497 Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on June 30, 1939, the hearing in Docket 3167 is now reconvened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., September 5, 1939.

Please note the appearances.

We are reconvened to receive evidence and testimony in behalf of the Respondents.

Mr. Lenure: If your Honor pleases, at the close of the Government's case I made motions on behalf of all of the defendant companies named, with the exception of Green Bag of Pennsylvania and Huron.

Those motions were decided the other day and certain exhibits were stricken in accordance with the order which, I assume, is a part of the record.

We were preparing, over the summer, and did prepare in partial form, certain other motions to dismiss which we wanted to submit to the Commission. We have not been able to file those before the Commission until we received this order, finding, of course, what exhibits had been stricken and what action the Commission took on our motions.

We have, however, this morning, since we got this
22498 order, filed certain motions with the Commission, to dismiss.

We have not filed any, however, for Green Bag of Pennsylvania. And Huron, your Honor will recall, filed motions to dismiss before we adjourned, while we were making motions here.

Trial Examiner Norwood: I think that those motions were considered,—Huron and Superior and Northwestern.

Mr. Leisure: Huron was the only one that filed it, your Honor, to dismiss.

Trial Examiner Norwood: Weren't they filed with the Commission?

Mr. Leisure: I think so.

Mr. Wooden: Superior made an oral motion to dismiss.

Trial Examiner Norwood: Before the Commission.

Mr. Wooden: Yes.

Trial Examiner Norwood: Yes. Well, I think the Commission passed on them.

Mr. Leisure: Now, there are certain other defendants who have independent counsel, and we have been getting letters in here. We got some here this morning. They also want to file motions. As soon as they got word of the action taken by the Commission on the motions to
22499 strike they also wanted to file motions to dismiss. We filed them for those whose letters we received thus far this morning, and we have also filed our motions.

I suppose the proper procedure would be to get some word from the Commission as to whether they want to hear us, as to whether they are willing to hear us argue these motions, and as to what action they want to take before we go forward, and I suppose that can be done in a few minutes.

I would like to ask for a short recess to find out what action the Commission wishes to take on these motions which we filed.

Trial Examiner Norwood: Well, I do not consider those motions timely. We are met here now to receive evidence and testimony in behalf of the Respondents. For my own part, I shall not take the time to consider them, but if the Commission's wisdom decides to do so, why, it is perfectly agreeable to me.

Mr. Leisure: Yes.

Trial Examiner Norwood: So, I shall give you 15 min-

utes to contact the Secretary of the Commission to see whether they are willing to hear you today.

Mr. Leisure: Very good.

I have already pointed out to your Honor with reference to whether or not they are timely. I have already
22500 pointed out that it was impossible for us to file the motions until we heard from the Commission on the preceding motions.

Mr. Wooden: Well, I would not agree to that. As a matter of fact, just like Huron filed its motion to dismiss orally in the summer, so all Respondents might just as well have filed their motions then.

Mr. McFadden: So far as their contentions, I think you are probably right, but we have to do it in this respect to protect our rights.

Mr. Leisure: I think Mr. Wooden will agree with us when he reads the motions that we were not in a position to make the motions until now. I think this is something the Commission will act on promptly.

Trial Examiner Norwood: We will have a 15-minute recess.

Mr. Paulson: I would like to point out those motions could have been made in the alternative so that the Commission could have disposed of the whole matter at one time.

Mr. Fox: I came on behalf of Green Bag Cement and also have a motion to dismiss which I will now file.

Trial Examiner Norwood: Do you wish to file that with the Commission or with me?

Mr. Fox: With the Secretary of the Commission.

22501 Trial Examiner Norwood: You will have to see the Secretary and file it up there.

(There was a short recess taken.)

Trial Examiner Norwood: The hearing will come to order.

Mr. Leisure: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Make your statement for the record.

Mr. Leisure: If your Honor pleases, during the intermission we have taken up the subject matter of the motions to dismiss, which we have filed with the Secretary of the Commission.

Reverting back to one other thing, covering what I said

this morning, I want to note a formal exception to the Commission's ruling on our previous motions to strike; that is, an exception to the exhibits which they did not strike. They did strike certain exhibits, and I note an exception as to the exhibits they did not strike and as to the testimony which they did not strike.

Trial Examiner Norwood: Exception may be noted.

Mr. Leisure: As to the present motions to dismiss which have been filed by us and are being filed, as I understand, by other attorneys, in the interest of saving time, without waiting for any order from the Commission, I sug-
22502 gest that Mr. Wooden, if he is willing to do so, enter into a stipulation with us on the record that we may go forward with our testimony without prejudice, and with the understanding, of course, that these motions will be considered, and that the calling of a witness will not prejudice us in any way, going forward with our case.

If that is satisfactory, I am willing to call a witness and proceed, purely in the interest of saving time; otherwise, I would like to wait until we hear from the Commission.

Mr. Wooden: The proposed stipulation is acceptable and is accepted, of course it being understood that this relates only to the motions to dismiss that have been filed and motions to dismiss that are en route for the purpose of filing.

Trial Examiner Norwood: Call your witness.

22504 (COM. EXS. 1905-A to 1905-F, both inclusive, were offered and received in evidence.)

22505 Mr. Leisure: Mr. Magee, will you take the stand, please.

JOHN F. MAGEE was thereupon called as a witness for the Respondents, and, having been first duly
22506 sworn, testified as follows:

Direct Examination by Mr. Leisure:

I am vice-president in charge of operations of the Alpha Portland Cement Company and have been since 1934. I first became connected with the company in 1913 as a plant engineer. Previous to that, after finishing high school I attended Lafayette College in the mining engineering department and was graduated in 1913 with a degree of

Mining Engineer. I was plant engineer for three
22507 years, until 1916, then I was made Superintendent of the plant at Martins Creek, Pennsylvania, in which capacity I continued until 1920. In 1920 I was brought into the main office at Easton as a special engineer on the general staff. In that capacity I was engaged in engineering work which related to all of the plants of Alpha Portland Cement Company—with and at all of the plants of the company. In 1921 I was made chief engineer of the company; and then about five years later, in 1926, I think it was I became management engineer, hav-
22508 ing to do not only with engineering work but with all problems of operations in managing the operating department of the various plants of the Alpha Company. I was management engineer from 1926 until about 1930, I think it was. From 1930 to 1934 I was plant manager actively and directly in charge of the operations at all the plants of the Alpha Company. Then in 1934 I was made vice-president in full charge of all operations. I have been familiar with the operations of all the plants of the Alpha Company since 1920 and most of them, particularly those in the eastern part of the country, since I became employed by the company in 1913. I have
22509 never been associated with any other cement producing or selling company.

Alpha operates eight plants at the present time: two in New York State, one at Jamesville, New York, which is about five or six miles outside of Syracuse; one on the Hudson River at Cementon, N. Y., although we call that plant our Catskill plant because it is near the Village of Catskill and was formerly the Catskill Cement Company; we have one plant in Pennsylvania at Martins Creek about seven miles north of Easton on the Delaware River; a plant at Mannheim in Preston County, in the extreme northeastern part of West Virginia; at La Salle, Illinois, about 80 miles west of Chicago; at Ironton, Ohio, which is on the Ohio River, in the center part of the lower border of the State; at St. Louis, Missouri, about ten or twelve miles outside the city limits, but in St. Louis County; and a plant at Birmingham, Alabama. We have a prop-
22510 erty at Belleview, Michigan, where there formerly was a cement plant, but the plant has been abandoned, and we now have a warehouse there, and we retained the property, but I don't call it a plant location.

Perhaps I should, but I didn't include that in the eight. If that is to be counted as a plant location there would be nine.

The plant at Martins Creek, Pennsylvania, was acquired about 1904. There are two units there. One was in operation at the time and the other was building. The Alpha Company finished the second one and operated them both.

The plant at Mannheim was acquired about 1909;
22511 Catskill was acquired also in 1909; the Jamesville, New York plant in 1917; La Salle, Illinois in 1920; Ironton and Belleview also in 1920; St. Louis, Missouri in 1922; Birmingham in 1928. Alpha did not build any of these mills except we finished building the one unit at Martins Creek. We operated all of them after acquiring them and made a number of changes in several of the other units, and continued to operate all of them until the present time with the exception of the Belleview plant, which is not operated now.

22512 I am in charge of the operations of all these plants, and as part of my duties, am visiting them all the time not by any prearranged schedule, but as occasion requires I get to each and all of them several times a year.

I am a member of a scientific society, the American Institute of Mining and Metallurgical Engineers, and have been for about ten or fifteen years. I was, at one time, a member of the American Institute of Mechanical Engineers, which I joined while in college and resigned from about ten years ago.

22513 Alpha has a research department that I would call small and modest. For many years it was a one-man affair, the research being confined to research on concrete work. Some few years ago Alpha expanded that phase of the department so that we now have two or three men working on concrete research, and also a very skilled chemist working on manufacturing research problems; that is, ways to improve Alpha's products and keep up with the progress of the industry. I have a staff of engineers working under me. Alpha has an engineering department which consists of a chief engineer, several draftsmen, some field engineers or special engineers whose time is devoted to studying ways and means of improving Alpha's plant operations which leads, sometimes, into new construction work. They also have charge of all major

improvements or major maintenance items which are big enough to warrant special attention of trained engineers rather than just left in the hands of operating men
22514 at the plants. Those men are all of scientific training, most all of college education, although some of our draftsmen are not college men.

Q. Now coming down to the subject matter of this case: Tell us just as briefly as you can what is Portland cement.

A. Well, it is a product made from the mixture of calcareous and argillaceous material, which materials are burned to the point of incipient fusion, the definition of Portland cement calls it, and then ground to a fine powder without the additional of any outside materials at that time except gypsum or calcium sulphate, which is allowed by the definition of cement.

22515 Concrete is made by mixing cement with sand and stone, using water as a mixing agent. After the water drys out, the mass solidifies and hardens and takes on the strength that concrete has. The difference between Portland cement and concrete is that cement is an ingredient used in concrete. It is the binding agent that holds together the sand and stone, ingredients more durable than cement itself. Cement, as the binding agent, gives the mass the strength.

22516 Q. From what you have told us, Mr. Magee, I take it that your company did not invent this substance Portland cement. When was Portland cement first made?

A. Well, Portland cement as such was invented, if anyone had invented it, by a man by the name of Aspdin, Joseph Aspdin, of England. Aspdin invented it in 1824, that is he at least—

22517 Q. Well, I had in mind, Mr. Magee, and the question has been asked by many people, what the word "Portland cement" meant. They seemed to have an idea it came from Portland, Maine, something like that. I was merely trying to get the record straight on that, about Portland cement, just what it is and where it came from.

22518 After limes and natural cements were developed in other places, Aspdin, in 1824, developed a cement made from burning impure limestone and argillaceous materials—meaning materials containing clay or shale. He

found that his product, when made into a concrete, resembled the stones which were quarried on the Island of Portland, England, and he therefore called that cement Portland cement, which name has hung to that type of cement until this day. That is the only significance of the word "Portland" in connection with Portland cement, but it has been so important that it has become almost a
22519 generic term. When you talk about the kind of cement, most people think about Portland Cement. Most of the companies have the word "Portland" incorporated in their name and that is to distinguish that brand of cement from the natural cements and the limes and things of that kind which preceded it. The process of manufacture of the so-called Portland cement has been somewhat changed since it was first manufactured, but more important, each step in the manufacture has been vastly improved. For instance, we are grinding our raw materials much finer than in the early days of the industry, burning our materials much harder, using more coal necessarily, and grinding our finished product, or cement, much finer.

22521 The very first use for Portland cement in this country was, I think, in canal building. It came along about the time that the Erie Canal was being built and the Delaware and Hudson Canal, and some canal in Illinois near Utica. It went from that into bridge piers. As the quality improved engineers began to realize that they could use it for structural work, building columns and beams and bridge beams. Later on it got into the highway field. So that now it is used in almost all types of building construction.

Natural cement is another kind of cement than Portland cement which is still being made in this country. It was made before Portland cement both in this country
22522 and in England but as the use of Portland cement developed and grew the use and manufacture of natural cement fell off, so that it is not a very large product and is used not for the same kind of work that Portland cement is used, but chiefly for mortar masonry work as a mortar. This natural cement did not acquire any name similar to the word "Portland". The word "natural" clings to it, however, and is retained to distinguish it from "Portland cement". "Rosendale" is a natural cement made in New York State, although "Rosendale" is some-

times used as a generic term for natural cements, but that is not extensively so. In the eastern part of the country perhaps natural cements are referred to as Rosendale cements but I do not think that is the practice in other parts of the country.

22523 Q. Well, now, coming on down, was the Portland cement then manufactured anywhere else?

A. In the beginning?

Q. In this country in the early days?

A. It was first made in the Lehigh Valley at Siegfried, Pa. It was also made in other parts of the country. In the early days I believe there was a plant in Maine and Michigan, but most of those plants petered out so that the industry only stuck and grew in the Lehigh Valley in the early days and then, later on, after it had become quite an industry in the Lehigh Valley, it spread to other parts of the country and stuck.

Q. Can you give us the name of any particular mill in the Lehigh Valley which made this early cement? There are a number of defendants named, here, from the Lehigh Valley.

A. Coplay Company at Saylor. I don't suppose the Coplay Company made a brand of cement by the name of Saylor. A man by the name of Saylor made this cement at Siegfried. The plants later became the Coplay Company, maybe; I don't know.

22524 Q. And to trace the development of this as rapidly as we can: Was this first cement manufactured by Coplay manufactured under any difficulties?

A. Oh, considerable difficulties. I think at first it was almost a failure but they stuck to it. Their product was very low but they had a great deal of difficulty in getting uniformity in their product; and, as I have said, at other parts of the country, they didn't succeed and abandoned their efforts, but the people at Coplay stuck to it until they began to make a product that was good enough to meet the cement that was being imported from England. Of course, in those days, that is the competition they had to meet.

Trial Examiner Norwood: About when was that?

The Witness: About 1875, I think. Coplay began to make natural cement in 1866, and I believe they began their Portland cement in 1875, maybe 1872.

22525 By Mr. Leisure:

Q. Now we are still dealing with this substance or product known as Portland cement.

Was the Portland cement produced at Coplay, which you have just described, made from the same materials as the foreign product?

A. No. In England the materials were all pretty soft materials, chalk, marl, things of that kind. At Coplay cement was made from what has since become known as cement rock, which is a low grade limestone, but it is a hard rock, it takes a lot of power to grind it to a fineness required to subject it to the heat in the kilns, and that sort of thing.

Chemically, I would say that the materials were the same, but physically they were entirely different.

Q. That being so, Mr. Magee, was the method of manufacture adopted in the United States similar or dissimilar to the method of manufacture of Portland cement in England?

22526 A. Well, generally speaking, perhaps similar, but there was considerable difference in the detail. As I have said, this hard rock in the Lehigh Valley had to be ground and pulverized to a very fine product, and then it had to be prepared for the kilns, usually adding a little water and making a briquette.

In those days when they used vertical kilns, that is. Perhaps after that the grinding of the cement was similar to that in England.

Q. As to the date you gave to His Honor a moment ago, again, and in answer to my questions, do I understand, Mr. Magee, that the Saylor Cement plant was the first to manufacture Portland cement in this country? I mean, successfully, of course.

A. Yes, sir.

Q. Do you know what the capacity of that plant was?

A. Oh, it was very small. I don't suppose they made more than about fifteen hundred barrels a year, whereas, today, a plant that would make fifteen hundred barrels in a day would be a very small plant.

Q. One further question on that early cement. To what extent was it used in this country prior to the time it was manufactured in this country, if you know?

A. Largely, as I have said, on canals and piers and abuttments for bridges and foundation work only.

Q. And from what you have said I understand that that cement largely came from England; it was
22527 Portland cement.

A. Yes, sir.

Q. Any place else other than England?

A. I think not at that time; no, sir.

Q. Do you know of any attempts to manufacture Portland cement in the United States prior to the time of the Saylor product, which you have just told us about?

A. Well, yes, there were some other plants that started up or some other attempts made, at the same time, in Maine and Michigan, and I don't know where else, but, as I have said, those attempts were not successful, so that the Siegfried attempt or Coplay plant was the first one to successfully produce Portland cement and keep on producing it.

22530 A great deal more care has to be taken with Portland cement than with natural cement, and the process is considerably more involved.

Examination by Trial Examiner Norwood:

Natural cement is cheaper from the standpoint of the purchaser. It is not burned as hard. I have mentioned the grinding and I have said that natural cement does not require the fine grinding of Portland cement. It is burned at a lower temperature and that is a very important point because it takes less coal to burn it.

22531 The manufacture of Portland cement requires a mixture of calcareous and argillaceous materials. The calcareous materials may be a high grade limestone, a lower grade limestone, and cement rock, which is a type of low grade limestone, marl, chalk, and, in one or two cases, oyster shells are used. The argillaceous materials are shale, clay or perhaps an alkali waste, if available, can be used. In some cases the proper relation between the lime and silica and alumina can be found in a deposit of rock such as a cement rock. In other cases mixtures of these materials must be made in varying proportions.

The word "calcareous" comes from calcium which means lime; anything which contains an abundance of lime is a calcareous material. Argillaceous means chemical
22532 materials such as silica and alumina.

In some cases the proper relation between lime, silica and alumina is found in one deposit such as a cement rock deposit. In other cases where there is a high limestone,

shale or clay or some other argillaceous material may have to be added in percentages varying from 1% up as high as 15%, or 20%, then in some cases it is the other way around, the main deposit may be a low grade limestone defi-
22533 cient in lime, and a high grade limestone may have to be added in proportions varying from 1% or 2% up as high as 20% to 30%.

The best relation of lime to silica and alumina and iron oxide in the finished product is about two to one; that is, somewhere between 1.9 to 1 and 2.1 to 1. We call that the lime ratio, and it is necessary to get that lime ratio within its limits in order to have a satisfactory cement that will meet all specifications and be a satisfactory product. The best ratio of silica to alumina is about three to one. There was a time when that wasn't so important, but some of the present-day specifications make it necessary to get that ratio pretty accurate.

The iron oxide really has no important function. It does act or tend to act as a flux but it takes up some of the calcium and alumina resulting in more calcium and alumina being necessary to make the combinations with silica that are more desirable so that iron is somewhat more of a detriment than it is an agent. Some of the present day specifications require us to use iron in order to take up the alumina and leave more silica for a combination
22534 with the lime.

In my experience in visiting these various plants, there is very little latitude in regard to the proportioning of the raw materials used in the manufacture of Portland cement and there is less latitude today than in the early days.

A high grade limestone contains from 95% to 98% or 99% calcium carbonate with very little other material. A low grade limestone may get as low as 60% with silica, alumina, iron and other materials making up the difference. When it reaches the 60% figure, in our industry, it becomes what we call a cement rock, a low grade lime-
stone containing the exact proportions of silica and
22535 alumina required for the manufacture of cement. In a case of raw material deposits which are of a low grade limestone, in our industry, we have to find a high grade limestone somewhere as near the plant as we can. Sometimes we have to go a hundred miles away to get it to make up the deficiency in lime. In determining the

suitability of limestone, you take into consideration the shale or clay that is to be used with it. If you have a rock deposit, you have to find out what your lime is and alumina and silica, and if you are deficient in silica and alumina, you have to look around for a suitable shale or clay deposit to make up that deficiency. Sometimes you find them near your limestone deposits and sometimes not.

I used the term "secondary material" in the sense that the primary material was the large deposit. It might be high in lime or low in lime. If high, the secondary material would be shale or clay or some other argillaceous material. If the primary material were low in
22536 lime, as it is in the case of some cement rocks, then the secondary material would be a high grade limestone. The proportions of the secondary materials it is necessary to use would vary from 1% or 2% up to as high as 20% or 25%.

There are no substitutes for limestone unless you could call the oyster shells and deposits of that kind substitutes. They contain lime but are not really limestone, although geologically, that is the way many limestone deposits were formed. I mean, later on, under pressure, those beds of shells became limestone. So, generally speaking, there are no substitutes for limestone. There are no substances other than oyster shells used in place of limestone except cement rock, if you want to differentiate that from limestone. Coral rock is not high in lime, I think, and could not be used.

22537 There are limestone deposits that cannot be utilized in the manufacture of Portland cement. For instance, limestone deposits which contain a large proportion of magnesia cannot be used because there is a limitation on the amount of magnesia in all cement specifications. As a matter of fact, I suppose that the high magnesia limestones, the dolomites, are the most prolific limestones in this country and in the world.

I have knowledge of the geological conditions in the United States with respect to the presence or absence of the materials that are required for the manufacture of Portland cement: These materials are found in the proper proportions in a natural raw material deposit in the case of cement rock. That is why the Portland cement industry got a good start in the Lehigh Valley because there are found deposits of low grade limestone with the almost

exact proportions of silica and alumina required for the manufacture of Portland cement. Later some deposits of this type were discovered in other parts of the country, but very few. I know of only two or three deposits outside of the Lehigh Valley where the mixtures occur
22538 naturally. These raw materials are not found generally in the United States, and, as a matter of fact, the deposits in Lehigh Valley are not as good now as they once were for two reasons: First, the part of the deposit containing the proper mixtures is being worked out, and secondly, the changes in specifications are requiring changes in proportioning so that in Lehigh Valley many plants today are using a secondary material which was not the case when the industry started there. In a few instances, natural cement rock is found in localities in the United States other than the Lehigh Valley. We have one in West Virginia at Manheim and there are probably one or two others. I don't have them in mind. Geologically, "cement rock" is a low grade limestone containing the proportions of silica and alumina and the absence of magnesia that are required for the manufacture of ce-
22539 ment. The cement rock in the Lehigh Valley is suitable for the manufacturing of cement because of the exact proportions of the lime to silica, alumina and iron. Those proportions vary in different parts of the deposits, and, in many cases, the good parts of the deposits are being worked out so that many plants who originally made cement out of cement rock, with no secondary material additions, are now required to add some high grade limestone.

The relative hardness of limestone is of importance in determining its workability. A hard crystalline limestone, such as marble, would be exceedingly difficult to quarry and reduce to the impalpable powder stage that is required in the manufacture of cement. That is another reason why the cement rock of the Lehigh Valley worked out better in the beginning than some other deposits, because that rock is not crystalline; it is a sedimentary deposit, a stratified deposit, a little bit less hard, and it can be crushed and ground a little easier than the crystalline limestone deposits.

22540 The relative moisture of the limestone is of importance in the manufacture of cement. Limestone usually does not contain much moisture, two or three

percent during the quarrying operations. In a storm it would pick up more moisture, ten or twelve percent, but ordinarily, two or three percent. That moisture in the dry process of manufacture, has to be driven off the rock before it can be ground. Consequently, if soft, wet materials are used, such as marl, or oyster shells, it is frequently found impractical to drive the moisture off. It may be 20, 30 percent moisture. When materials such as that are encountered, the general practice is to add more water and grind them to a wet slurry, that being the wet process of manufacture.

Those conditions and characteristics have very much to do with the location of cement plants. It is a matter of major importance that a cement plant be built where the materials required for manufacture are available. Usually, plants are built on the site of the limestone or primary material. Sometimes a secondary material is found nearby; sometimes they have to be sent in from some distance. There is one exception to that statement, however, and that is that plants may be built on the Great Lakes and draw their limestone over the lakes from the North-
22541 ern Peninsula of Michigan. But in all other cases, I believe plants are built where satisfactory deposits of limestone or cement are found.

I think considerable time has been spent in the development of new rock beds. In fact, I know that considerable time has been spent by many companies in trying to locate satisfactory raw materials adjacent to good cement markets. Alpha's Ironton plant was bought when it was a going plant. There was a deposit of rock being mined near the surface of the ground which was not proving satisfactory, and we found that it was necessary to find a better deposit, which we were able to find on the same property by going down 500 to 600 feet, with a shaft into the ground, where we mined a better grade of limestone at that level than we were previously taking from the upper level. At Alpha's Mannheim plant we changed our
22542 method of quarrying there. We are operating in the same deposit that was being operated when we bought the plant, but it was an open quarry face in the early days with considerable over-burden. As we quarried back the face of the hill, the over-burden became so heavy that we had to abandon that method of quarrying and go to a mining method, driving headings into the side

of the hill, and as that quarrying developed, we got those headings driven a mile into the side of the hill. Alpha is still looking for new deposits.

Gypsum is a hydrated calcium sulphate, which, in itself, has some setting properties; but it is mixed with cement in order to retard the set of cement. If gypsum were not mixed with cement, it would set so quickly that it could not be worked, the floor could not be trowled or anything of the kind. A chemical reaction which takes place between the lime and the calcium sulphate has the effect of retarding the set of cement when gypsum is added. Plaster of Paris, a dehydrated gypsum, is sometimes called a substitute for gypsum. It has the same action as gypsum but is not used to any large extent in the cement industry and is a more expensive material.

22544 The word "set" means becoming hard. All cement has the same tendency to set but there are different degrees of setting time, depending on the composition of cement. I think specifications always include specified limits for setting time so that all cements must conform to those specifications. The minimum time for Portland cement is 45 minutes and the maximum is 10 hours—it can't take its initial set before 45 minutes and it must take its final set within 10 hours. That is the standard specification which is adopted by all engineers, I think, and all Government bureaus who make specifications. I know of no variation in that specification at all.

A mixture of gypsum does not vary in quantity from batch to batch of cement when it is being actually made in the plants—it is quite uniform. It is mixed in about 3 percent, but the amount is controlled by a specifi-
22545 cation on sulphur trioxide, SO_3. That is the specification of cement admits just of 2 percent SO_3, and the upper limit of the amount of gypsum that is added is fixed by that specification, so there is some slight variation to the 3 percent.

Gypsum is not produced by Alpha. In the beginning of the cement industry most of the gypsum came from Nova Scotia, but later on deposits of gypsum were discovered and worked in New York State and other places in the country; Virginia has gypsum, Texas, Oklahoma, Iowa, Michigan; farther west, I don't know much about. There is gypsum on the Pacific Coast. Foreign gypsum is still used at one of Alpha's plants but it is only used where the

plants are far enough away from the domestic gypsum fields. There is no gypsum located in Pennsylvania.
22548 Alpha obtains gypsum from different places for different plants. The plants in the northeast take gypsum from the New York field. The plant in Illinois takes gypsum from Iowa. At St. Louis, we get it from Iowa or Oklahoma. In Birmingham, Ala., we get gypsum either from Oklahoma or Texas, on the one hand, or more recently, Nova Scotia, by boat—gypsum is being brought to Jacksonville from Nova Scotia and made available there, but it comes from some distance in either case.

All of the substances or a majority of any of them which I have described—the calcareous and argillaceous materials and the retarder—in my experience, have never come under the control of any company or any group of companies.

22551 Alpha's average consumption of dynamite is a quarter to a half pound to a ton of rock blasted out. The annual consumption runs somewhere between 500,000 and a million pounds, depending on the rate of operation at the Alpha's eight plants.

Rock shrinks in the process of manufacture. A ton of rock which weighs 2,000 pounds makes about three barrels of cement. Put in another way, a barrel of cement which weighs 376 pounds requires about 620 pounds of rock, which shrinks to 376 pounds of cement during the process of manufacture.

Examination by Trial Examiner Norwood.

That is not waste. The lost weight is due to the moisture and the carbon dioxide CO_2 which is driven off. Limestone in its raw form is calcium carbonate and when the carbon dioxide is driven off the lime is changed to an oxide, CO, and in that process about 40% of the weight
22552 of the rock disappears, and the gasses and steam that goes up the stack.

Examination by Mr. Leisure (Continued).

Shale also shrinks to a lesser extent than limestone. It loses its moisture. Other combinations take place.

Alpha has a plant at Martins Creek, Pa., which was acquired in 1902. I think I previously said 1904, but it may

have been 1902. It was about that time. The first unit that we bought there was operating at the time. There was another unit at the same location on the other side of the hill which was under construction at the time we bought that piece of property, and Alpha finished
22553 the construction of that plant and started the operation.

The primary raw material for the operation of the Martins Creek plant is a large deposit of cement rock which is a low grade limestone, containing exactly the amount of silica and alumina required for the manufacture of cement. For quite some time that was all that was needed. I can say that the proportions of limestone, shale and alumina taken from the quarry were such that we could make cement, but as time went on we worked out the best and the highest lime proportions of that quarry, and that together with the fact that there were changes in specifications which required high grade limestone made it necessary to bring in a high grade limestone, which we now use as a secondary material at that plant. We have been using that for ten or fifteen years.

This deposit of natural cement rock, which we found at Martins Creek, occurs in other places in the Lehigh Valley. That lies in a bed which runs in a northeasterly and southwesterly direction which all the beds in that region lie; that is, parallel to the Appalachian Mountain chain, running over a distance of 20 to 25 miles from the Delaware River on the eastern end to down across the
22554 Lehigh River at the western end. 18 or 20 plants, something like that, are located in that area. The rock deposit on that property (Martins Creek) is suitable for the manufacture of Portland cement with the qualification that it is now somewhat deficient in lime, so we have to add some high grade limestone to it.

The average proportion of secondary raw material to the primary material which we have been using at that plant (Martins Creek) in the last 10 or 15 years is somewhere between 5% to 10%. For short periods it has been as high as 15% and below 5%. These conditions are not
22556 constant but vary from month to month and from day to day, almost from hour to hour. This requires the employment of chemists to analyze the drillings and requires checking as the rock is crushed and ground. These chemists constantly vary the amount of

high grade limestone that is added at any given time. This high grade limestone is obtained from the Lebanon District in Pennsylvania, about 100 miles from Martins Creek.

Direct Examination by Mr. Leisure.

22566 At Alpha's Martins Creek Plant we use pulverized coal; that is, we buy what is known as slack coal, dry it and pulverize it so that the fuel we use in our rotary kilns is pulverized coal. The coal is not on our own property but is brought about 400 miles from the West Virginia field. That is the nearest source of suitable fuel and the cost of the coal is about $4.00 a ton delivered at Martins Creek. Freight is a large part of
22567 the cost. At that plant it is about $2.80, about 70% of the delivered cost. The availability of that coal is important to the operation of the Martins Creek Plant. We would not be able to make cement at Martins Creek if coal was not available within reasonable limits.

The Martins Creek Plant uses about 40 tons of Gypsum a day, costing about $4.00 a ton delivered at the plant. Of this $4.00 about $2.75 represents freight. The Gypsum comes from the Akron district in New York State.

The witness identified Resp. Ex. 396 as gypsum which is used at Martins Creek.

22568 (RESP. EX. 396 was offered and received in evidence.)

22570 Alpha has a cement plant at Cementon, New York, acquired in 1909 at which time it was operating as a cement plant. We call that our Catskill plant because it is a few miles south of the village of Catskill, a well known town in New York State. Cementon is simply the post office address of the plant. We also call it Catskill perhaps because it was formerly owned by the Catskill Cement Company and was known as the Catskill plant at the time we took it over.

The raw materials for that plant are in a hill that lies about half a mile or a mile back of the Hudson River, west of the Hudson River, the ridge of the hill being parallel to the Hudson River. There is a deposit of what is
22571 known as Beacraft limestone which is high in lime, 90 to 95%, but the deposits are not in a bed that extends for any great distance. They are what are called lenticular lines; that is, there are small beds of this lime-

stone that are strewn about this hill, which makes it necessary to move from one deposit to another as we work a deposit out.

The argillaceous material there is clay which lies in the low lands nearer the river. These three parts are not naturally in a proportion needed for making Portland cement—they have to be very carefully mixed. In the first place the high grade limestone lies adjacent to—and that is in all cases where they are found there—a low grade limestone we call black rock composed chiefly of lime and silica. The high grade limestone and the low grade limestone are quarried together, the chemists regulating the quarry in operation so that he gets the right combination of lime and silica. There is very little alumina in either
of these rocks, so that it is necessary to have a sep-
22572 arate quarry operation, a clay operation, to supply the alumina content. The clay is mixed with the rock at the plant also under the supervision of the chemist.

The rock deposit in the Hudson Valley region generally is exactly the same on both sides of the river. It may be somewhat more extensive on the east side of the river, but not very much. It is the same type of deposit on both sides of the river in the Hudson Valley. As far as I know all of the available rock deposits in the Hudson Valley area that are workable are being worked. The limestone is very scarce on the west side of the river. We are constantly looking for additional property to supplement our available deposits. As far as I know the deposits on the east side of the river are also limited to the immediate locality there which is the so-called Hudson District. There is a limit to the length of time that a deposit will last. The
rock that we have inside of that plant will last not
22573 more than about forty years.

There are three plants on the west side and two plants on the east side of the Hudson in the Hudson River Valley region. There is another plant further up the State but that really is not in the same district. Alpha has purchased additional limestone bearing property since acquiring the plant at Cementon. Since the original acquisition we have purchased two or three adjoining parcels to supplement our available deposit of rock. We prospected several others and they did not pan out so we did not buy them.

In comparing the cost of manufacture of standard Port-

land cement at the Catskill plant with the cost of manufacture at the Lehigh Valley plant the quarrying operation at the Catskill plant is much more difficult and much more expensive. The deposits are smaller, smaller quarrying openings. We have to jump from one spot to
22574 another. The rock is harder and in every respect they are more difficult to operate, and it costs us more to quarry stone at Catskill than it does at Martins Creek.

Examination by Examiner Norwood.

There would be a difference in the cost per barrel. I think I could give the difference in cost per barrel. I would say on the order of five or ten cents a barrel, due to this particular thing that we are talking about.

Examination by Mr. Leisure.

Fuel for the operation of the Catskill plant comes from Western Pennsylvania or the eastern West Virginia coal field, and the availability of that fuel is of importance in operating the Catskill plant. The
22575 cost of fuel is higher at Catskill costing about $4.50 delivered at Catskill as compared with $4.00 at Martins Creek. The difference is entirely in the freight rate. The distance from West Virginia is about 500 miles, I think. The Catskill plant uses about 150 tons of coal a day when operating at its full capacity. At the present time the rate of capacity is about two-thirds. As compared with the other plant the amount of gypsum used in the Catskill plant is the same proportion, about 3% gypsum is added; that is, about 12 pounds per barrel. About twenty tons of gypsum a day is used at the Catskill plant at the cost of $4.00 per ton. $2.75 of the $4.00 delivered
22576 cost of gypsum is represented by the freight rate. That is about 70%.

Alpha has a plant at Jamesville, New York, acquired in 1917 at which time it was operating as a cement plant. There is a very good reason for the location of the plant at Jamesville. It is adjacent to the limestone quarry of the Solvay Processing Company. They quarry high grade limestone and screen it, shipping the larger sizes to their plant which is on the other side of Syracuse, about ten miles away, I think. We buy the screenings from this quarry and that gives us a primary raw material to which we add 15% of shale, the combination giving us the exact

proportion of lime, silica and alumina that is required for the manufacture of cement. The raw material used
22577 in the Jamesville plant is obtained from the Solvay Process quarry operations. We have limestone property of our own there, but we do not operate it. The physical character of that limestone is a high grade crystalline limestone being pretty hard and containing 90 to 95% calcium carbonate. The Jamesville plant also requires for its operation a material containing silica and alumina in the proper proportions. We find that about seven miles away in a shale deposit which we own and operate. That argillaceous material is a shale which is a sort of slaty material, and which is not so hard as limestone. The quarry is on the side of a rather steep hill having manual operation of quantities that are very small. The shale quarry was part of the plant when Alpha acquired it in 1917.

22578 As compared in quality with the raw materials used for the operation of the Catskill plant the limestone at Jamesville isn't nearly as high a grade as the limestone at Catskill. As I told you at Catskill we quarry the limestone and black rock together, resulting in a quarry product at Catskill which is lower in lime than the limestone at Jamesville. Alpha has undeveloped limestone property at Jamesville, but no limestone quarry of our own.

If the plant at Jamesville were operating at full
22379 capacity, it would probably use about 400 tons of limestone per day. It is now operating at about half of capacity and using about half of that.

The Solvay Process is about half a mile to a mile from our Jamesville plant. Solvay does part of the crushing, 1 or 2 steps, and our Jamesville plant does the final stage of the crushing. The cost of the stone purchased from Solvay is 60¢ per ton delivered to the Jamesville plant, of which about 12¢ or about 20% of it represents freight.

The shale quarry is about five or six miles on the
22580 Delaware, Lackawanna & Western Railroad from the mill location, and that is the nearest available source of material. There is no other plant manufacturing Portland cement in Jamesville or in the Jamesville area. We load the shale on railroad cars and the railroad hauls it to our plant. When running at full capacity the Jamesville plant consumes about 70 tons a day. The freight

charge paid on that shale is about 20¢ a ton. The fuel for the Jamesville plant is obtained from the Western Pennsylvania or Western West Virginia fields, a distance
22581 of about 400 to 500 miles. When running at full capacity the Jamesville plant uses about 75 tons of coal a day. The mill is operating at the present time at a rate of 50%, about 55% of its capacity. The cost of the coal is about $4.00 a ton, of which about 70% or $2.75 represents freight. The Jamesville plant uses about the same proportion of Gypsum that is used at Alpha's other plants; that is about 12 pounds per barrel or about 10 tons a day. The Gypsum comes from the Akron district of New York State, near Buffalo, and costs about $4.00
22582 a ton, the freight representing about 70%, or $2.75, of this delivered cost.

We have rebuilt some parts of the Jamesville plant since 1917; the stone dryer building was rebuilt; the raw grinding mill is entirely new; some of our kiln equipment has been rebuilt. The coal house has been rebuilt twice, that is, the coal grinding and preparing was rebuilt twice in that time. We have made some changes in the finished mill, where there was considerable rebuilding.

22583 The Manheim plant located in West Virginia, was acquired about 1909. At the time of acquisition the property was operating as a cement plant, but it wasn't in very good condition and Alpha did extensive rebuilding before it could be operated. By operating, I mean that I would characterize the Manheim plant at the time of its acquisition as an operating unit but that it required extensive reconstruction before Alpha started operating it. At the time of acquisition it was not in very good financial shape.

The plant is built on property which contains a
22584 very large deposit of low grade limestone which approximates the cement rock in the sense that it contains the proper proportions of lime, silica and alumina. We add a very small amount of shale to increase the alumina content, however. This is done in the regular quarry operation so that it comes pretty close to being a natural cement rock deposit, one of the few outside of the Lehigh Valley. The plant was located there because of the presence of the natural cement rock deposit. There are no other pants in the immediate vicinity in this location.

The rock deposit is a 40 foot bed of limestone located high up on a hill. The quarry operation at first was
22585 an open face quarry but as the face of the quarry progressed back into the hill the over-burden became so heavy that it was no longer profitable to remove the over-burden, and therefore a mine had to be developed with headings 40 feet wide and 40 feet high driven back into the deposit. It pitches in one direction about eight degrees but it can be worked almost as if it were a flat deposit.

Fuel for the Manheim plant comes from the relatively nearby mines of West Virginia at a delivered price of about $2.50, about a half of which is freight. 150 tons per day is consumed when the plant is operating at full capacity.

22593 The Manheim plant is now operating at about 45% of capacity. The amount of time that a plant is shut down, on the average, varies at the different plants. At the Manheim plant when I say 45% of capacity I mean that is the rate at which we operate when we do operate but our business is somewhat seasonal. We do not operate the full year at any plant. In recent years operations at the West Virginia plant have been at a very low rate so that we have been operating at not much more than half of the time at 45% of capacity, which means that our
22594 rate of operation has only been 20 or 25% of annual capacity.

About twenty tons of gypsum a day is consumed at the Manheim plant when we operate at full rate. The gypsum comes from New York State at the cost of $5.00 a ton delivered at the plant. The freight is $3.00, may be a little bit more; 60 to 65% of the delivered cost.

The Ironton plant was operating as a cement plant when Alpha acquired it. The raw materials for operating the Ironton plant are obtained from a large deposit of fairly high grade limestone which lies five or six hundred feet under the ground. Prior to our operation the stone was taken from a deposit somewhat nearer the ground than that, but it developed that that did not have the proper proportions of chemical elements required, so that
22595 this new deposit was developed five hundred fifty feet below the surface of the ground. That is a fairly high grade limestone running around 85% calcium carbonate and contains some silica and alumina, but not

enough to give the proper proportions so that we have to operate a separate quarry where we quarry sand, stone and shale in one operation which is mixed with the limestone. The argillaceous material is obtained from the side of the hill on the same property as the limestone and the plant. There is about 85 to 90% of lime in the calcareous material. The argillaceous material is a sandstone and a clay taken simultaneously from one operation under the direction of the chemist. He determines how much sandstone and how much clay shall be quarried at one time and in what proportions they should be mixed with the limestone coming from the plant.

22596 The particular limestone deposit at the Ironton plant is quite an extensive deposit as far as our property goes, but it does not extend much beyond our property; I mean there are no adjoining properties where the deposit occurs. It is the only deposit in that particular district. There are two cement plants, I think, within a radius of forty or fifty miles, but they operate on an entirely different deposit. There are three cement plants in that particular area. There are no rock deposits anywhere in the Ironton area suitable for the manufacture of cement other than the ones I have mentioned.

In the operation of this plant it is necessary to make changes every day in the proportions of the raw ingredients. The chemist determines the composition of the stone that is being mined; in fact, he directs the mining operations to some extent and directs the mixing of the sandstone and clay accordingly.

22597 At the present time the Ironton plant obtains its fuel from the western West Virginia or eastern Kentucky field. Ironton has obtained coal from that source for about three or four years. Prior to that we took coal from our own property. There is a seam of coal on our own property which we have never attempted to mine ourselves, because we are not experienced coal miners. We leased the mining rights to a local concern who operated the mine, sold the larger part of the coal to us and the smaller parts to other customers in the district. That coal was a low grade coal, not as good in quality as the coal from West Virginia and Kentucky. As compared in cost with the coal in West Virginia when we used it it was cheaper and enough cheaper to compensate for its lower grade or quality. The change came about

when the railroad reduced the freight rate from the West Virginia-Kentucky field into our plant, and on the basis of the new rate we were able to buy higher grade coal at the same price that we could buy the lower grade coal mined on our own property. It was not possible for
22598 anyone to operate it at any lower cost to us than we had been paying. That accounts for the change and the abandonment of the mine operation on our own property. In my experience the availability of this supply of coal either on our property or in West Virginia is very important to the operation of the Ironton plant. At both the Ironton and Manheim plants, where I have described the mining operation, it is necessary to get the stone. It is not likely that a plant could be operated in that expensive way of getting stone unless there were cheap coal near by, so that the lower fuel price is offset by the high quarry cost, and vice versa. The Ironton plant consumes about 150 tons of coal a day at full operating capacity and we operate somewhere around 67%, somewhere around two-thirds, when we operate. The coal costs
22599 about $2.25 or $2.50, of which about 40%, or 87¢ represents freight. Gypsum for Ironton comes from Michigan at a cost of $5.00 per ton of which 60% or $3.00 represents freight.

22600 Washington, D. C.,
September 6, 1939.

22607 JOHN F. MAGEE was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Leisure (continued).

About 60 or 70 per cent of the price paid for gypsum at Ironton is represented by freight charges. I think the freight rate is $3. When operating at full capacity, Ironton consumes about twenty tons of gypsum a day.

When Alpha acquired LaSalle it was operating
22608 as a cement mill. The raw materials for that plant are on the property at LaSalle, consisting chiefly of an extensive deposit of relatively low grade limestone in a bed that is about 20 or 25 feet thick, and which is a

very thin bed as limestone deposits suitable for the manufacture of cement go. This bed of limestone is overlaid with a burden of clay which averages in thickness of 20 or 25 feet. The overburden is as thick as the limestone, so that it is necessary to have a major stripping operation to remove this clay from the top of the limestone and then we can quarry the limestone in the usual manner. Clay that has to be removed from the limestone is not suitable as the argillaceous component for the manufacture of cement because that clay contains chiefly silica. The low grade limestone has all of the silica that the specifications will admit, so that the secondary material required is an alumina bearing material. We take that up in comparatively small quantities from a bed of high alumina shale that lies immediately under the limestone bed. This also requires a quarrying operation. That is a
22609 secondary raw material added in proportions of about 5%; something like that.

At LaSalle, Alpha uses a very low grade bituminous coal which is taken from a mine that is located several miles from the plant. There is a better grade of coal available from the Southern Illinois field, but it carries a higher freight rate. Generally speaking, or at most times when the local coal is available, it is available at a lower price than the Southern Illinois coal, so that it pays Alpha to use the local coal even though it is of a
22610 lower grade. Both coals are what are known as high volatile coals to differentiate them from high carbon coals which are used in power plants for steaming purposes. The cement kilns require a relatively low carbon, high volatile coal in order to get the maximum explosive effect as the flame enters the kilns. By the low grade coals in the LaSalle district and the better grade coals in Southern Illinois, I am thinking in terms of thermal value. The unit that is used to measure thermal value is the B.T.U.'s. The coal in the LaSalle district runs about 10,000 B.T.U.

By "low grade coal" I mean coal that runs
22611 around 10,000 B.T.U. per pound as compared with a coal of 13,000 B.T.U. per pound. From what I have said, it is clear that local coal is the low grade coal.

About 110 pounds of local coal per barrel of cement is required at the LaSalle plant and about 230 tons of coal a day is consumed there at capacity. At the present time

the LaSalle plant is operating at 67% of capacity. That is, two kilns out of three. If we operate at that rate of capacity for eight or nine months, we come out at about 50% of annual capacity. The local coal costs about $2.50 a ton of which about $.50 a ton represents freight.

22612 Alpha purchases high grade coal from the Illinois fields at such times that the local coal is not available, which usually comes in the summer months when the local mines like to shut down because of slack business. Coal from Southern Illinois costs about $3 a ton of which more than half, about $1.50 to $1.75 represents freight. I do not remember exactly. About 100 pounds per barrel of coal from Southern Illinois is required for the manufacture of a barrel of cement—a little less than the local coal.

The LaSalle plant consumes about 25 tons of gypsum a day when it is running at capacity. The gypsum comes from Fort Dodge, Iowa, and costs about $4.00 per ton, of which about 70% represents freight.

22613 The St. Louis plant was operating when Alpha acquired it in about 1922. The principal raw material is taken from the property where the St. Louis plant is located, consisting of a high grade limestone in a bed about 60 or 65 feet thick with two or three feet of clay overburden. This being a high grade limestone, it is necessary to have secondary or auxiliary raw materials to furnish the silica and alumina content. The silica content is taken from two sources: first, some of the clay which is removed from the rock in the stripping operation can be used at that plant during the dry seasons of the year. It is impractical to conduct that operation during the wintertime or the wet seasons and at such times, if the plant is operating, we take our clay from a clay pit at another location but right on the property of the St. Louis plant. To get the alumina content, we have to go further afield. When Alpha took over the plant our predecessor company was using a fire clay which they were purchasing, I

22614 guess, from a fire brick manufacturer. The third material bearing the alumina content is brought from a factory in East St. Louis where they have a waste product which serves our purpose.

The composition of an overburden is largely clay and is used as one of the secondary raw materials. That requires a selection or sorting of material. We cannot take all of

the clay as it comes because we have to be careful to get clay that does not contain chert or boulders. Other sources of argillaceous material other than the ones I have described are clay deposits on the property which we work from time to time.

22615 Q. You mentioned alumina-bearing material. How much does that material cost, if you know?

Mr. Wooden: Your Honor, just a moment. I wish to make an objection to this question. I might have objected to others. I have been letting it go along. It seems to me we are getting further and further afield from the issues of the case. I think this question calls for an answer that is wholly irrelevant and immaterial, and I object to it on that ground.

If we were to go into the questions of cost as a whole there would be immeasurably more to be said for it than to go into these little detailed items. We don't even put it into cost per barrel, these detailed items, and if this same line of questioning goes on by Mr. Leisure,—I don't know whether he intends to ask them of each witness for all the companies, but if he does it with a dozen or so other companies scattered throughout the country I can see it is going to take an enormous lot of time, and to my mind it serves no purpose as to the issues of the case.

Trial Examiner Norwood: There are some things that are necessary to complete this picture, or that might be desired by the Commission in the possible application of our remedy here. This Commission is an instrument of Congress, and as long as we have spent so much

22616 time on this thing we might let in this information and it might be useful with regard to this industry.

Mr. Paulson: One other thought that occurs to me: It seems to me that before this line of testimony could, by any chance, be material or relevant, we should have an offer of proof from the Respondents' Counsel that they will demonstrate that there are no other available deposits of cement rock in the United States better than those at which the plants are located. I say that because the only reason this line of testimony could be material is that they are located in the best possible places in the United States.

In other words, it is only half of the picture, and until we have an offer of proof to show us that there are no possibilities of improving the locations of these plants, that

would entail, of course, a geological review of the nation. I don't see how it can possibly cast any light. It would leave the Commission without any knowledge as to the undeveloped resources.

Mr. Wooden: It has been my position, Your Honor, that the matter of absolute or actual costs are irrelevant and immaterial. The fact that costs vary, I don't so consider. But even if costs were relevant and material I contend that the line of testimony going in through this witness is not relevant to the item of cost because it
22617 is a piecemeal thing that doesn't give any light as to what costs are, as a whole.

We are not concerned with what the cost of dynamite and coal and gypsum is in terms of the amount of tons used or those things. We haven't anything on the cost per barrel, even with those items.

Trial Examiner Norwood: But suppose he shows the similarity of costs and conditions and claims that that contributes to a certain extent to the similarity of prices?

Mr. Wooden: There is no attempt to show that the costs are—

Trial Examiner Norwood: We have to build up this picture.

Mr. Wooden: But even through this witness he is not showing the costs were similar; he is showing they are different.

Mr. MacIntyre: Whereas the question yesterday—if Mr. Leisure should continue the line of questions he is attempting to show varying costs. I said then if that is what they are attempting to do it is not at variance with the complaint because the Commission considers it has proved its case, apparently, so why go on any further with that.

Mr. Brick: If Your Honor pleases, that was not
22618 Mr. Leisure's contention.

Trial Examiner Norwood: I don't feel I would be justified in applying the rule of thumb here in excluding every little bit of irrelevant testimony.

Mr. Wooden: I don't, either.

Trial Examiner Norwood: And it isn't clear to me that I should exclude this. I think in a case like this, unless it is clear to the Examiner, he shouldn't exclude it.

Mr. Paulson: The Commission should be entitled to an

offer of proof where the materiality and relevancy is not a part.

Trial Examiner Norwood: I think his remarks up to this time constituted an offer of proof.

Mr. Leisure: I want to assure Your Honor that after a great deal of study and thought on these pleadings we are not going to ask a single question that, in our opinion, is not relevant or material, and we will endeavor not to do that, and we feel we are not doing that in this instance.

Trial Examiner Norwood: I should resist inclination on the part of Respondents to overdo this subject.

Mr. Paulson: Of course there is a difference of opinion on that point right now. We think they are overdoing it. Mr. Leisure makes a statement that he will not
22619 offer anything that is not material and relevant, and I have no doubt in the world that he believes it is material and relevant, but that materiality and relevancy is not apparent to us inasmuch as the questions aren't directed to anything brought out on direct.

Trial Examiner Norwood: If Respondents will attempt to cut out some of the unnecessary detail which we have had heretofore with this witness, why, I shall overrule the objection.

Go ahead.

Mr. Leisure: I think the question was—

Trial Examiner Norwood: Read the question.

(Last question read.)

A. $1.16 a ton delivered at the plant. The freight rate is 66c.

By Mr. Leisure:

The St. Louis plant is now using bituminous coal in making cement. For a period of five or six years Alpha used as a fuel at the St. Louis plant natural gas
22620 from Louisiana. The Southern Illinois coal field is the nearest suitable supply of coal for the St. Louis plant. Prior to the time that Alpha acquired the St. Louis plant, bituminous coal was used as fuel and we continued to use coal until about 1928, I think, when we changed over to gas. When Alpha acquired the St. Louis plant it was operating at full capacity and was consuming about 300 tons of coal per day. At that time the plant ca-
22621 pacity was about 4,000 barrels. The delivered cost of the coal is $2.40 a ton and about half of that, or $1.20 represents freight.

The circumstances under which Alpha changed over from coal were that gas was being piped at that time from Louisiana to the City of St. Louis, the line running right past our plant. In their effort to sell a good volume of this gas, the gas companies offered Alpha a temporary low price as compared to the price of coal at that time. Subsequently the supply of gas became unavailable at certain seasons of the year, so that we could not depend upon the supply of gas; the price went up relative to the price of coal and it became advantageous to go back to the use of
coal. In my experience gas is never as efficient as
22622 coal on a B.T.U. basis. The St. Louis plant is
equipped to burn either coal or gas so that we can shift to gas if we find that the price is low enough to make up for the lower efficiency.

At the present time the St. Louis plant consumes about 200 tons of coal a day at capacity. We operate about two-thirds of capacity when we operate but, as at all of our plants, we only operate part of the year, so that the annual rate is somewhat less than that, depending upon the number of months of operation.

Gypsum for the requirements of the St. Louis mill comes from Oklahoma at a delivered cost of $4.50 per ton of
which around $3.00 or $3.25, or about 75% of the
22625 total of the delivered price is freight. The total
consumption of gypsum at the St. Louis mill is about 25 tons a day.

The Birmingham plant, acquired in 1928, is a wet process plant. The raw materials for the operation of the plant are obtained right on the property. The plant was built on the site of a limestone deposit which is quite extensive not only on our property but beyond our property. There is quite an extensive bed of limestone that runs right under the City of Birmingham throughout the valley that lies between the hills on the south, which contain iron ore, and the hills on the north which contain coal. In that area there are five or six other cement plants. Altogether I think six in that valley that I just described. I wouldn't say that that particular deposit is fully availed of there
by these various plants.
22626 The deposit is a lower grade limestone running
about 80% or 85% carbonate. It lies in a bed which is over a hundred feet thick, although at the present time we only operate the face of sixty-five feet. As the quarry

develops we probably will operate a higher face. There isn't much overburden there, a foot or two which has to be stripped off, but it isn't a major operation.

The argillaceous material is a sand stone which comes from a property ten or twelve miles away. It comes in over the railroad at a freight cost of about 15¢ a ton.

We change the proportioning of our raw material from day to day and during the day at all of our plants and that type of change takes place at the Birmingham plant over a longer period of time. There has been some signifi-
22627 cant change there, in that we are adding more sand stone and less shale than we did ten years ago be-
cause the new cement specifications are calling for higher silica content, so there has been a tendency in that direction. I consider that a permanent change for the present—it might change back again some day. The percentage of moisture in the rock found in the Birmingham quarry is normally only 2 or 3%, but sometimes in wet weather it gets as high as 5 or 6%.

This rock is an ideal rock for a dry process plant. Usually the wet process is used where the raw materials are quite wet to begin with so that it does not pay to dry the moisture off and grind the materials into a dry state. However, there are thought to be some advantages in the wet process. Some engineers have built wet process plants where raw materials were not wet, where they were dry
enough to use in dry process, as at this plant.
22628 That consideration is usually a matter of lower construction cost, and it was thought at one time that the wet process was better adapted to making uniform mixture, that is, keeping the mixture of raw materials uniform.

Bituminous coal which comes from the Birmingham coal district nearby is used for the operation of this plant. The delivered cost of said coal is about $2.50 a ton. The fuel consumption is about a hundred pounds per barrel. Now the plant is operating at 50% of capacity. Power is purchased from a local utility.

Gypsum at the present time is coming from Nova Scotia,
although it usually comes from Texas or Oklahoma.
22629 I think it is the only plant that draws gymsum from Nova Scotia, and that is just a recent matter. It is beginning to come in in the south from Nova Scotia. The Birmingham plant uses about 25 tons of gypsum a day at

full capacity. Gypsum is always bought at the most favorable price available and the delivered cost at Birmingham is $5.50 to $6 per ton of which about 75% represents freight.

I inspected the Belleview plant about the time we took it over. I was one of the engineers and management men on the field, to actually take over the management of
22630 the plant. It was operating at that time, but it was not a well constructed or well operated plant.

The machinery was small units with a great deal of confusion in the conveying equipment between the units. The stone and wet clay were mixed together before
22631 they were crushed and in an attempt to crush them together, which just couldn't be done. The plant was running out of raw material more than half of the time. The waste-heat boiler plant was only developing half of the power requirements of the plant whereas an up-to-date waste-heat boiler should supply all. The whole plant, both as to construction and operating methods, was a mess.

The raw materials were obtained right on the property. A ledge of good grade limestone on the property was the primary material. The secondary material was brought in from another property about ten or twelve miles away in the form of a clay which was hauled into the plant by truck. The mixing of these materials, generally speaking, was the same as at other plants except the attempt to put clay through the rock crusher was a poor operating method.

22632 The use of labor and fuel in the power consumption compared very unfavorably with the operation in Alpha's other plants at that time. The units were small kilns and mills and required a rather large amount of labor both for operational and maintenance repair work. The kilns were short and required 50% more fuel than the usual dry process kiln at that time and, as I remember it, consumption of power was high. We made all of our own power partly with waste-heat boilers, but the rest had to be made by firing ordinary boilers with coal. It was a rather inefficient operation all the way through. After we took over the Belleview plant we started to improve it. We put electric shovels in the quarry to replace steam shovels and we rebuilt the stone department in order to dry rock and clay separately, to crush them and dry them separately, and to mix them after the drying rather than

to crush the rock along with the wet clay. We made
22633 some other improvements, spending about $100,000
altogether. After making all these improvements
we became discouraged and decided that rather than try
to rebuild the plant it would be more advantageous to tear
it down and build a new one. That would have involved a
capital expenditure of several million dollars and after
ten years of struggle and study we abandoned the opera-
tions in 1930.

The Belleview plant is not in operation at the present time. Operations were discontinued in 1930 and in 1935 it was scrapped and machinery that was there was sold. We decided that if we ever did want a plant at that location it would have to be a new plant throughout and we had better get rid of the machinery and equipment we had, and we sold it at scrap prices.

We were still taxed on the plant after we scrapped it. When the plant was an operating unit the local taxes
amounted to about $20,000 a year. After we stopped
22634 operating it, the taxes were cut to about $10,000 a
year. After we scrapped it we were gradually able
to get the taxes down so that last year I think our taxes were between $2,500 and $3,000 a year.

The capacity of the Belleview plant, I think, was about 700 or 750 thousand barrels. Between 1920 and 1930 we were operating it at full capacity, that is, we were banging out everything we could get all the time, or as near as we could get it. The mill was not operating successfully at the time that we closed it. It was a very unsatisfactory operation and, as I said, it required a major operation or a discontinuance of operation, and we chose the latter.

Bituminous coal for the operation of the plant
22635 came from Kentucky, a distance of 500 or 600 miles.
I don't know just exactly how far; 500, anyway. The freight rate for the fuel for the Belleview plant was higher than at any other plant which Alpha operates. The fuel consumption at Belleview was about 150 pounds of coal per barrel which is very much higher than the ordinary dry process plant. Labor costs were higher at the Belleview plant because we had to use more labor to operate the plant and keep it in repair. Then, too, labor rates were going up at the time so that labor costs became pretty high as we went along. We made some progress in reducing the use of labor in an attempt to get our costs

in line with other plants. But, as I have said, we couldn't see our way clear to get very far without entirely rebuilding the plant. We did make some progress, however.

In passing on the availability of raw materials for the manufacture of Portland Cement there are things which must be considered besides mere analysis of materials. The accessibility of raw materials, in terms of quarrying must be considered. What the quarrying cost will be is an important thing to know and that depends upon the type of rock deposit and on the location of deposit with respect to the plant site. The availability of fuel to burn clinkers must be taken into consideration. It is necessary to be near enough to a coal market to be able to get coal at a satisfactory price. Power must be available at a reasonable cost or you must be in a position to make it. In the early days we used to have to consider the availability of a labor market but with easy transportation and plenty of labor that is no longer a consideration.

The principal fuel in the manufacture of cement for 22637 for all of Alpha's plants is coal. Fuel is used principally in the rotary kilns which is the heart of the process of manufacturing cement. It is also used in dry process plants to drive moisture off the rock or other raw materials, so that they can be ground. There are small uses around the plant; for heating buildings and what not, although if a plant—and there are still some few plants who generate their own power—the coal is used as a fuel for that purpose. If the coal that might be used for generating power were eliminated, I would say that about 95% of the fuel is used for kilns in the wet process and about 85 to 90% is used for kilns in the dry process plants. In that case 5, 6 maybe 10% is used in the dryers. Some plants use coal for generaing plant power; not many, these 22638 days. Power is used to operate all equipment throughout the plant; the rock crusher, the tube mills, and ball mills which are used to grind raw materials and cement; also the kilns and conveyers. In fact, all moving equipment requires power to operate.

In the early days of the industry power was furnished by engines spotted in numerous places around the plant and units driven through line shaft drives. Later on, the power was centralized in a central station and generated in the form of electricity which was sent through the plant

to drive the equipment through electrical motors. That is the type of power plant today. Some of these power plants are operated from steam generated through burning coal under boilers and some are operated by steam generated from the waste gases of the kilns. In other plants power is not generated at all but is purchased from a nearby public utility.

22639 The cost of fuel is now about 80% higher than at the time I entered the industry in 1913. Alpha always attempts to buy the raw materials necessary for our manufacturing operations in any manner which will give us the lowest net cost to the mill, subject to quality.

Q. Would you say, Mr. Magee, that there is any difference in the cost of manufacture at the various plants of the Alpha Company?

A. Well, there is some difference; yes, sir.

Q. Does the difference in the cost of manufacture depend in any way upon any particular equipment at a given mill?

A. Not so much upon the equipment, because that is pretty much alike. I don't mean it is standardized, but the same type of equipment is used at all mills. It depends more on the rate of the operation of the plants than anything else, plus, of course, the cost of raw materials, fuel, labor, rates, and things of that kind.

Q. Now in the case of your mills that you have described that go outside for raw materials, how does that cost compare with that of the mill which operates, say, on its own property?

22640 A. Well, raw materials that have to be purchased are considerably more expensive than raw materials that can be quarried or mined on your own property, although mining costs are high, but still I don't know of any raw materials purchased outside that aren't higher than even mining costs.

22642 Q. Mr. Magee, in your previous testimony, either this morning or yesterday, you told us that it was desirable to have raw materials for your plant, did you not?

A. Yes, sir.

Q. And you told us a few moments ago that with certain raw materials available you have closed down at least one of your plants because you could not operate it successfully, did you not?

A. Yes, sir.

Q. You also told us, either yesterday or today, that not only were raw materials necessary in the manu-
22643 facture of cement and in the successful operation of a cement manufacturing company, but you must also have a market.

I am now asking you how you regard in your daily experience the relative importance of markets and materials, and whether you do take them into consideration at all, or not; if you know.

22644 A. Yes, sir; they must be taken into consideration along with the availability of raw materials. Sometimes an advantage in one respect offsets an advantage in another respect. Most often that happens. That is, if you have a good market you are liable to have high cost raw materials or a high cost coal supply.

22645 If you have a good raw material you may have high priced fuel or a poor marketing situation which won't enable you to operate your plant satisfactory anyway, so that the two things must be taken into consideration and, as I say, almost always one factor offsets the other.

By Mr. Leisure:

Q. And that would be, of course, necessary in your experience, to take them into consideration in operating, successfully, a cement plant?

A. Yes, sir.

22646 Q. Mr. Magee, is there any variation in the cost of manufacture at a given plant over a period of time?

A. At any one plant over a period of time, yes, sir.

Q. Will you explain how that comes about?

A. Well, it is chiefly due to the rate at which the plant is operated. That is a very important factor and, also, of course, to fluctuations in prices of raw materials, fuels, labor rates and so forth.

Q. What is your method, if any, in making im-
22647 provements to offset any of these increasing costs?

A. Well, of course, we study these factors that tend to increase costs and are continually studying them, as a matter of fact, trying to find ways of installing new equipment or new processes to offset an increase in costs that may come about by some outside influence such as I have mentioned.

Q. If the Alpha plant were operating at the same ratio of production to capacity would there be any difference in the manufacturing costs, then, in the Alpha mills?

A. Slight difference of course; not very substantial.

Q. What would it be, then?

A. Oh, I would say not more than 10 per cent variation as between any plants that are operating at the same rate of capacity with the exception of our small unit at Jamesville. This is one exception to that statement, there. As I have already testified, our raw material costs are high and it is a small unit which involves a high-unit labor cost and other high-unit costs so that the costs there probably would vary more than the 10 per cent I have mentioned.

Q. Ten per cent of what, Mr. Magee?

A. Ten per cent in our over-all costs.

Q. Now has there been any change in the rate of wages paid to your cement workers since you entered the employ of the company?

A. I will say there have.

22648 Q. How does that average?

A. Well, in 1913, when I came in the industry, the average labor rate of our company was 20 cents an hour and today it is 80 cents an hour.

Q. How does that influence your manufacturing operations, if at all?

A. Well, for one thing, with increasing labor rates it was necessary for us to find ways to use less labor and we have succeeded in reducing the use of labor in that time from about one man-hour per barrel in 1913 to about a half a man-hour per barrel at the present time.

Q. And how does the productive capacity of these different units compare now with the productive capacity when you were first employed by your company?

A. You mean of our operating unit? Well, somewhat greater. We would have a greater capacity from any given unit—we would have developed a greater capacity from any given unit in that time if it were not for the fact that the specifications, cement specifications, have required finer grinding and harder burning and in that way imposed a task on our equipment which has tended to offset the more efficient operation that we have been getting from the equipment.

In terms of work done, however, all of our units are more efficient now than they were 25 years ago.

Q. Then, Mr. Magee, summing all these factors
22649 up and getting at the final result: What has been the final result in your cost of production; decreased or increased; the cost of production?

A. It has increased considerably.

Q. What was the average rate paid for labor by your cement company when you were first employed?

A. Twenty cents an hour.

Q. And you have told us about the improvements you have made from time to time in an attempt to offset these additional expenses?

A. Yes, sir.

I do not carry annual capacity figures in my head, but I can give you the daily capacities and if you allow me to do some figuring I can tell you what the annual capacities are using the daily capacities as a basis. The source of my information regarding Alpha's daily capacity
22650 is based on the past record; capacities that have been developed at some previous time. As a matter of fact we use the best daily average for any year that we can find; that is, operating days. Production during the year divided by the number of days that we operate gives us the yearly average and we consider the best annual average that we have developed as our capacity figure. It wouldn't make any difference whether the plant was operating at full capacity. As I have said, we would divide the total by the number of days so that it could be a year when we were operating all the time. But if you mean at full rate of capacity, it would be when all equipment was operating during the period involved in the calculation. The combined capacity of all the plants of Alpha amounts to about 12,500,000 barrels a year figured on the above basis. In my opinion Alpha could produce that amount of cement annually if the specifications were the same as they were when those capacity standards were developed. As a matter of fact, with the fine grind-
22651 ing and the harder burning we probably would be able, if we had the business now, to produce 90% of that, maybe eleven to eleven and one-half million barrels at present specifications. If the specifications would go back to the previous standards we could produce twelve and one-half million barrels. We continue to carry the

other figures because it is our standard of attainment. We feel we have to find some way to overcome these higher specifications and develop those figures. They are figures that are a matter of record capacities that have been developed and I consider it my job to develop those capacities again if and when I am given a chance to do it. Alpha has been estimating these capacities of its plant in the way I have just now described ever since I have been with the company. It is necessary for me to know the capacities of the various plants in order to know how to schedule my plant operations intelligently so as to keep my men employed over a maximum period of time and develop
22652 an orderly operating schedule. I have to know how much cement I can produce daily and how much cement I can produce if I run the plant for a full year. Then, depending upon how much cement we think we will be called up to produce, I can adjust my operating schedule accordingly. I have no other occasion to use the capacity figures.

Alpha has no statistical department, but there are sections in several departments with men who devote all their time to statistical work. In the operating department there are three men who analyze plant production records and do statistical work in connection therewith.
22653 The chief information used in making up operating schedules for the coming year is information as to prospective trend of business acquired from such services as the Dodge Service and Engineering News Record. The information given by those services is analyzed by our statistical men who make up schedules indicating what shipments we are likely to be called on to make, using a previous period as a base. If the people who are analyzing the construction industry think that business will increase 10 or 20% this year, we will estimate our shipments for this year 10 or 20% higher than they were last year. Then we will tie that into the operating capacity of our plant and develop how many months we can operate and at what rate of capacity. The rate of operation is not adjusted to any certain percentage or capacity. In determining what amounts should be allowed for the anticipated in-
22654 crease or decrease in anticipated business we estimate whether we are likely to ship more or less than we did last year after putting all of this information together. We take into consideration any local circum-

stances such as a nearby large job, Government job, or another job of that kind that may destroy to some extent the value of a general survey. Then we put all that information together and sort of use our judgment as to what cement we will be called upon to ship and then, as I said, we adjust our operating schedule accordingly at a certain rate of capacity which will keep the plant operating and the men employed a maximum period of time. For instance, if we think we are going to ship and have to produce at 50% of capacity, we would not operate the plant at full capacity 50% of the time. That would not be economical and it would not be a satisfactory employment situation for our men. We would operate the plant at 67 or 70% of capacity. Those figures depend upon the number of kiln units in a plant. That is, if you have two and operate one that is 50% and if you have three and operate two that is 67% and so forth. We operate the plant at an economical rate of capacity for the maximum length of
22655 time that it can be done. We do not go very far off as to the accuracy of our surveys or as to estimated business. Sometimes a big job will come in unexpectedly that we don't know about but as a matter of fact we have what you call a moving project on that. We make up our schedule twelve months in advance but we adjust them every month so that we know pretty well twelve months ahead of time what we are going to be called upon to do. And that is our job and our business is to do it. In the last ten years we have operated our plant at an average of not more than 25% of annual capacity. It wouldn't be practical to operate the plant for three months of the year at full capacity to develop that 25%. We operate them at 50% of capacity for six months of the year or, better yet, at 30 or 35% of the capacity for nine months of the year. That is both a matter of economical operation and a matter of satisfactory employment situa-
22656 tion which is something our company has always taken into consideration and something that all companies are having to take into consideration in these days of organized labor. "Q. And those are the reasons for your taking that step; planning? A. Yes, sir."

We don't stock much clinker these days; on an average of perhaps 10% as much as the cement stock. When I first came into the industry it was the practice to store considerably more clinker than is stored these days; twice as

much; I mean, in terms of percentage. It was not unusual in those days to have 20 to 25% as much clinker in stock as cement. During the course of the year the clinker stock fluctuates somewhat but as a matter of fact most cement plants today are operated with a minimum of clinker stock and there isn't a great variation. In some plants there is a seasonal variation, that is clinker is stocked in the spring and ground up in the summer and fall. But that is not the usual practice in the industry today. Clinker de-
22658 teriorates in quality after a certain length of time. It deteriorates progressively but after six to nine months it is seriously deteriorated. The longer clinker is stored the poorer the quality of cement. At one time when I first came into the industry there was a feeling that clinker ground easier if it was stored or seasoned, but more recently, in the interest of better quality of
22659 cement, the storing of clinker has been discouraged by engineers and consumers and has been practically discontinued by manufacturers. That subject is at times covered in our specifications. A recent specification by the Board of Water Supply of New York written by a well-known engineer, Mr. Merriman, covered the matter of storing clinker when if said that cement must be immediately ground, clinker not stored.

The witness identified Resp. Ex. 397 as the specification of the Board of Water Supply of New York to which he referred.

Voir Dire Examination by Mr. Wooden.

22660 Mr. Merriman is a consultant engineer who has had life long experience in the cement industry. He is one of the best known and best qualified concrete engineers in the construction business and devoted most of his time and attention to water works. He has never had any connection or affiliation with the cement industry. This is the first time I know of that a prohibition of storing clinker has appeared in a written specification, although it has been frequently specified in less formal manner by other engineers, who as I said a moment ago have been discouraging the practice of storing clinker for some years.

22661 (RESP. EX. 397 was offered and received in evidence.)

Examination by Mr. Leisure (Continued).

Clinker deteriorates much faster than cement in storage. The only purpose in storing clinker is to pro-
22662 vide flexibility between the burning operation and the grinding operation of the plant. If small amounts of clinker are stored, the burning operations can continue if something happens to shut down the grinding operations, and vice versa.

If clinker is mechanically cooled it can be ground or reduced to cement immediately, which is what that specification called for. In that case clinker can be turned into cement in a matter of two or three hours, perhaps. But if clinker is cooled in storage, as was one time the general practice but is not now the general practice, it takes two or three weeks for it to cool to a point where it can be properly handled in the grinding operation. The
22663 general trend has been against the storing of clinker, which has necessitated the installation of clinker coolers in order that the clinker might be ground immediately and not stored, or, if stored, stored simply in small quantities, which are turned over in a day or two. The clinker cooler is similar to the waste heat boiler in the sense that it recovers a certain amount or a small part of the heat contained in the clinker. Waste heat boilers recover a large part of the heat otherwise carried away in the gases discharged from the kiln. Otherwise there is no connection, except that the development of the waste heat boiler, that is, the development of that method of generating power for the plant, has made it necessary to operate all parts of the plant at one time and made it, therefore, impractical to store any large amounts of clinker.

Alpha makes no use of statistics on clinker produc-
22664 tion.

The witness identified Resp. Ex. 398 as a sample of clinker in the smaller sizes. The clinker as it comes out of the kiln varies from fine dust up to the size of a baseball, but the bulk of it is the size of a pea. Its texture is like a walnut.

Trial Examiner Norwood: And what do you do to this to make cement out of it?

The Witness: You grind that to a very fine powder, sir, adding a small proportion of gypsum, as I have testified, to retard the set.

(RESP. EX. 398 was offered and received in evi-
22665 dence.)

The location of the plants has quite some bearing on the size of the storage space generally. It depends largely on the density of population. In the northeastern part of the country one plant may serve fifteen or twenty states and with the different specifications called for by those states it is necessary to store substantial quantities of cement in fifteen or twenty different bins, so that larger storages are required in the northeast on that account. Not so much so in the midwest. In the southeast a single plant serves a rather large number of states so that large storages are required down there. There is also the matter of climatic conditions which I think enter into the question. Altitude also has an influence. In the northern
22666 part of the country where the winters are longer, the peak shipments come in the summertime and are higher and it is necessary to carry some cement in storage in order to take care of those higher peaks. That is not so much so in the south. On an average at our plant 70% of our shipments come in the middle six months of the year and in the other slack six months we make and store enough cement to take care of peaks in the busy six months working that out to the best of our ability.

During these periods of time it is necessary to sample and test these stocks either during the manufacturing period or immediately upon being stored. The sampling and testing has an effect upon the amounts of cement stored because the acceptance of a test for cement very rarely, I think never, carries for a period longer than six months so that if we have a cement tested for a certain state or certain engineer or certain customer and it is not used in the six months' period, it has to be retested before they
22667 will accept shipment. The more cement stored the greater your capital investment for storage facilities and the more the cost to handle cement in and out of storage. Alpha has storage facilities to accommodate about three months' supply. I think that is quite general in the industry, certainly somewhere between one and three months, and I think that it is the general practice of the industry to store somewhere between two and three months' supply of cement. It is necessary to have that large supply in storage in order to spread out our operations, to keep our plants operating during parts of the

winter months when we do not ship so much, and to take care of the peaks of the summer months when we ship more cement. We do that for two reasons. First, it is more economical for us to string our operations out, as long as we do not go to too low a rate of operation in doing so; that is because the cost of carrying an idle plant is considerable and has to be taken into consideration in reasoning along that line. Alpha always does, and I
22668 can say the industry in general, takes into account the employment situation and so conducts its operations as to give as much employment as possible to the men that work in the plants. The amount of storage
22669 space has no relation whatever to the amount of business that Alpha does in comparison to that of its competitors.

The increase in special specifications indeed has had an effect on Alpha's storage requirements. There are a greater number of engineers, a greater number of State laboratories, State highway departments, and Government bureaus such as the Reclamation Bureau and War Department calling for special cements and testing cements which require our setting aside a larger volume of tested cement and in order to do that we must have larger storage facilities. Alpha has made special expenditures for facilities of that nature. In the last few years, in
22671 1937, I think, Alpha spent $100,000 at the Birmingham plant to build an extension to the storage facilities in order to take care of the increasing demand for tested cement. In 1938 Alpha spent $200,000 for the same purpose at the Martins Creek plant in Pennsylvania and this year Alpha is spending approximately $150,000 to do the same to its Catskill plant in New York.

By Mr. Leisure:

Q. Now, as to special cements, Mr. Magee, are there any factors that influence the size of your storage facilities for those cements?

Mr. Wooden: Again, Your Honor, I object as being irrelevant and immaterial.

Mr. Leisure: I am talking about specifications.

By Mr. Leisure:

Q. It is all standard Portland cement, isn't it, Mr. Magee?

A. Yes, sir; it is all standard Portland cement.

22672 A. Well, I have already said that we require our requiring more and more storage space to take care of cement manufactured to meet special specifications, —that is, it is, Portland cement; but it is cement made to meet special specifications, which are coming more and more into the business every year and every day. Also more and more people are testing our standard brand

22673 of cement and asking it to be set aside for them to be drawn from their bins when shipment is called for. So that in that sense more and more space, storage space, is required for those types of cement.

If you mean by "special cements" high early strength cements and white cement—

The Witness: The Alpha Company does not make either of those types of cements, but if we did we would have to have still more storage space for that type of cement.

By Mr. Leisure:

Q. I meant by "special cements" these special specifications. Now, does your answer apply to them?

A. Yes, sir.

Q. Very good.

Are there any sections of the country that demand those special specifications more than others; that is, the Northeast or Southeast? Is there any difference in the location of those demands?

A. Yes, there is more of it in the Northeast and Southeast than in the Mid-west, for instance.

Q. How does the amount of space you have to de-

22674 vote to these special specifications that you have been discussing, of the Federal Government, compare with the space you devote to other special specifications?

A. Well, we require more space to take care of Government specifications, not because of the specifications so much as because Government jobs, as a rule, are larger than other jobs, although occasionally we run into State jobs or private jobs which are as large as Government jobs, but, generally speaking, the Government jobs are larger, and for that reason require more space.

22676 In order to make standard cement, which is made under specification, the first step is the quarrying of the rocks. There is a difference in the manufacture of

Portland cement in the early days as compared with the methods used at the present time for the manufacture of cement under specifications, which I have been de-
22677 scribing. The methods in the old days were much cruder than now in operating quarries, biting off 15 or 20 foot layers at a time, whereas now we drill the entire face of the quarry. If it is 100 or 150 or 200 feet high, we drill that quarry with well drills and blast down large quantities of rock at one time. In the old days the stone was loaded into carts or small one-ton cars by hand; today they are loaded by steam shovels or electric shovels and hauled by gasoline locomotives and electric locomotives instead of mules.

Examination by Trial Examiner Norwood.

That has a tendency to reduce the cost in that it reduces the amount of labor required, but it gets you into a power cost, which is an offsetting influence. Labor rates being very much higher than they were then, the end result is an increase in cost.

22678 An open face quarry is a quarry on the side of a hill or a big hole in the ground which is exposed so that you can get at it. The other method of quarrying is the mining method which is a mine driven into the side of a hill or a shaft mine below the surface of the ground. The practice of blasting was different in the early days, with small drill holes, and small quantities of powder charged in each hole. Today with six inch well drill holes we have as much as a half a ton of powder in each hole and blast out large quantities of rock, two or three hundred tons at a time. The object of blasting out these large blocks is in the direction of better efficiency. At the present time after the blasting process, the rock is loaded with large power shovels, steam or electric, sometimes running into large units, one, two or three cubic yards dippers, two or three cubic yards at a time. The newest type of
22679 shovel, of course, is the electric shovel which was not used when I first started in the industry.

The electric shovel was not in use at the time I came in the industry, but came in somewhere between 1917 and 1920. In one instance in West Virginia we had to abandon the open-face method of quarrying when the overburden of the open quarry became so great that we had

to mine the stone. The mining of stone is very much more
costly as compared with the quarrying of it. At the
22684 Manheim plant in West Virginia there was an open-
face quarry which then developed into a drift mine;
that is, drifts or headings into the side of a hill. At our other location where we had a mine it was a shaft operation from the start. There was a development there from one level to another, but in both instances it was a shaft operation. It is necessary to mine clay and shale. Sometimes they are not accessible from the outside and a bed or seam has to be followed into the hill in order to extract the materials. We are not able to use the overburden, or the material that is above the seam. The extent of the overburden varies. In some quarries it is just two or three
feet and in other quarries it is as thick as the bed of
22685 stone that is being quarried. As you work an open-
face quarry into the side of a hill the overburden increases.

The Catskill plant has an open-face quarry, but due to the characteristics of the stone it has to be operated at two levels; that is, in order to get high limestone from one level and low limestone from another level. It is pretty much like two separate quarries, although it is actually one quarry operation. The primary crushing operation is sometimes performed in the quarry and if the quarry is close to the plant, it is done at the plant. In the case of the Catskill plant, the primary crushing operation is performed at the quarry quite some distance away from the quarry face, involving a rather long haulage, but the crushing is part of the quarry operation. The limestone deposits in the Hudson Valley differ from the deposits generally because they are not scattered. The beds of stone
are not contiguous and are in the shape of lenses
22686 scattered around the hillside. At Catskill, our quarry
is more than a mile away from the plant. The crushed rock is conveyed over an aerial tramway, buckets that hold about one ton apiece being conveyed from the quarry at the top of the hill to the plant, which is down on the river flat. At Catskill clay is taken out of the ground with an electric shovel, loaded on electric cars and hauled to the plant where it is dried and mixed with the stone. When the clay is brought in we store it in some part, not in large quantities, but enough to take care of the exigencies of the bad weather and keep the plants running when we are unable to operate the quarry.

The plants in the Hudson Valley region do not use the dry process of manufacture exclusively. One of the four plants in the Hudson Valley region uses a
22687 wet process.

The quarry at Manheim is a mine on the side of a hill with 8 headings driven a mile into the side of the hill. The quarry has a twenty-eight foot face and permits the use of a small sized electric shovel for loading. It is feasible to use a steam or electric shovel in the mining operation if the headroom is sufficient. The rock is conveyed to the mill after loading by electric haulage, storage battery locomotives and trolley locomotives.

22689 The mining costs at Manheim are higher than open quarry costs at other plants which is the usual
22690 type of quarrying. The mining method was the kind of operation that was being carried on at the Ironton plant when Alpha acquired. The crushing operation at the Ironton plant is a gyratory crusher and the loading is by electric shovels similar to Manheim.

LaSalle is an open-face quarry with the overburden as deep as the bed of rock. At St. Louis there is the same type of quarry, but the overburden does not amount to much; and Birmingham is an open-face quarry with only a foot or two of overburden.

The next step in the manufacturing process is the
22691 crushing and grinding of raw materials. Crushing is usually done in two stages, sometimes in one stage. The first stage is a gyratory crusher or a roll or a jaw crusher, something that can take large sizes of stone "as big as that table". Sometimes they come from the big shovels, "breaks it down in the first stage to 4, 6 inches"; and then a secondary crushing operation with gyratory crushers or hammer mills, breaks it down to about 1 or 2 inches in size. These crushers are tremendously large machines. There may be one or two crushing stages. At some plants very large hammer mills are used in one stage operation, but they are not very successful and they are not generally in use. Gyratory crushers were in use when I came to Alpha but they were very
22692 small units. At the present time the crushers are bigger and better.

The small crushers that were in general use 25 or 30 years ago would do well to handle 50 tons an hour; today 400, 500 or 600 tons an hour are not unusual. The sec-

ondary raw materials such as shale and clay are usually crushed separately. They are dried separately in the dry process plants or in the wet process they are not dried at all. In both events, the primary and secondary ma-
22693 terials are usually mixed just prior to the fine grinding. Our chemists have a great deal to do with that operation. They determine the proportion of the mixture and keep a very active control by sampling hourly and adjusting the mix hourly.

After the rock is crushed it is dried in a dry process plant. In the wet process plant it goes directly to the grinding mills without drying. The storing of crushed rock is usually done before the drying, although in some instances crushed rock is stored after drying. It is done both ways. There are two objects in the storing of crushed rock. The first is the flexibility between the quarry operation and the mill operation; that is, with the supply of stone stored the quarry need not operate in bad weather, in the middle of winter, and also the mill can operate if the quarry breaks down or vice versa. The other object is to facilitate the uniformity of mix. If the raw ma-
22694 terials are stored while the chemist is finding out the chemical composition, he has a better chance to regulate the mixture of raw materials in order to get a uniform mixture. The length of time this material is kept in storage depends of course on the size of the storage. I don't know of any plant where raw materials would be in storage for more than a week, if there was an actual turnover. As a matter of fact, there is no deterioration at all in raw materials and they can be held in storage for years if it works out that way. Storage facilities vary from just a pile of stone on the ground in the yard of the plant with a drag line scraper to lift it to various types of open and closed buildings, with bridge cranes or conveyor belts or equipment of that kind to handle the stone in and out of storage.

Rock as it is quarried contains 1 or 2% moisture which is inherent in almost all rock and then depending upon weather conditions it may rise to as high as 5 or 6%; I mean, in the best conditions. The moisture has an effect in the grinding. The raw materials can not be pul-
22695 verized sufficiently if they contain any substantial amount of moisture. It is necessary to reduce the moisture to less than 1% in order to sufficiently pulverize

them. If they contain considerable moisture to start with it may be better to add water and grind them in the wet stage in the form of slurry, which develops in the wet process.

It is dried in the rotary dryer; that is, a revolving cylinder 5 or 6 feet in diameter to 40 or 60 feet long. In the case of a single shell dryer, just a revolving cylinder, the cylinder is slightly inclined as it revolves and the raw material is fed into the upper end and works its way down through the dryer and after it is heated it drops out of the lower end. Some kind of fuel is used to inject flame into the lower end of this revolving cylinder at a temperature of 1,000 to 1,500 degrees, moderately low temperatures, we call that in our business, which serves to dry the
22696 moisture off the rock. The transportation of the stone from the storehouse to the dryer depends upon the type of storage. Some kind of a conveyor or crane arrangement is used to pick up the stone and deliver it to a suitable conveyor or elevator which conveys it to the grinding mills. Those are not the same cranes that were used when I came with the Company. There has been considerable development in that respect. In the early days stone was just piled on the ground and lifted up with a crude crane of some kind or perhaps a belt conveyor would run into a tunnel under the pile. At the present time we confine stone of that kind to storage with concrete walls and a bridge crane operated by one man picks up the stone and throws it anywhere that it is wanted. In the early days all of our operations were hazardous and all of our equipment was not well guarded particularly our conveyors. Formerly we had a type of conveyor called
22697 a screw conveyor which used to chew men up pretty badly. Those machines are well guarded now with safety committees working and studying so that very little time is lost through accidents in Alpha's plants these days.

Grinding of raw materials is usually done in two stages, although sometimes it is done in just one stage. The first stage of grinding is either a ball mill or a centrifugal mill of some type. The second stage is always a tube mill. If it is a one stage grinding, that may be a combination mill which is a large tube mill designed to accomplish the purpose of a ball mill and a tube mill in one unit, or it may be a very large high speed centrifugal mill. This description has reference to the grinding of the raw material before burning.

The term "ball mill" means a heavy steel cylinder usually about 6 or 8 feet in diameter and 8 or 10 feet, may be 12 feet long, which is about half filled with large steel balls 3 or 4 or 5 inches in diameter. As the mill
22698 revolves at approximately 20 revolutions a minute, the steel balls roll over each other and roll against the side of the mill, which is lined with heavy cast steel plates, and the raw materials; that is, the 1 or 2 inch rock that is fed into this mill, passes through and is subject to the attrition or grinding action of the balls and the steel plates and comes out considerably reduced in size.

The tube mill which follows the ball mill as a second stage is also a revolving steel cylinder, but it is a minimum of 20 feet; that is, it runs from 20 feet to 40 feet in length, and the diameters are larger, running from 6 to 10 feet in diameter. It is charged with smaller balls from 3 inches down to ¾'s of an inch in diameter. There are sections or compartments in the mill separating the larger size and smaller size balls and at other times it is just one compartment. In that mill the raw material is reduced to a fineness of what we call a 90% passing 200 mesh.

This is a trade term, 200 mesh, referring to a 200 mesh sieve. It means 200 wires to the linear inch, 40,000 openings to the square inch. When I say 90% passing a 200 mesh sieve, I mean a 90% of this ground product must pass through this sieve which has 40,000 openings per square inch. In some respects it is finer than a silk handkerchief. At least, it will hold water; you can pour water on a 200 mesh sieve and it won't go through it.

The witness identified Resp. Ex. 399 as a 200 mesh sieve of standard size which he had just de-
22701 scribed. The size is specified in standard specifications.

Voir Dire Examination by Mr. Wooden.

The American Society of Testing Materials is a standard specification for testing cement, and they specify the size of that screen, of the cylinder, everything is specified. This particular screen, 200 mesh, has been accepted as the standard since the beginning of the specification in 1904.

(RESP. EX. 399 was offered and received in evidence.)

22702 *Direct Examination by Mr. Leisure (Continued).*

This is the limestone, shale, clay, and all the raw materials mixed together and ground. I have been describing raw material grinding. Approximately 90% must go through this sieve but that will vary some with different plants. The tube mill and ball mill were in use when I came into the industry but they were smaller in size in those days. In these days they have a good many refinements. The units are more productive now because they are larger, but even at the same size they could produce somewhat more today than they did in those days, at the same specification, at least.

22703 A. "Lehigh" mill is a centrifugal type of mill which does the fine grinding in some instances in place of a tube mill. The Lehigh mill is sometimes called the Fuller mill because it was made by the Fuller Engineering Company who were located in the Lehigh Valley. The Fuller Company made this mill and sold it to cement people all over the country. It is now made by the Babcock and Wilcox Company and is no longer called the Lehigh mill. This high speed centrifugal mill is different from the tube mill and ball mill.

The witness identified Resp. Ex. 400 as a sample of pulverized raw material reduced to the 200 mesh fineness that he had spoken of and contains the proper proportion of lime, silica, and alumina, ready for the burning operation.

22704 (RESP. EX. 400 was offered and received in evidence.)

When I first came with Alpha there were no steps between the raw grinding and the other operations. Raw material was fed directly from the grinding mills to the kilns. Today it is different. It is the practice to store that pulverized raw material in fairly large quantities, varying from a day or two's supply up to a week or 10 days' supply, in order to give the chemist a chance to analyze the chemical composition and make any adjustment necessary through recirculating and remixing the material after it is ground in that state; the secondary reason being the flexibility between kiln operation and grinding operation, so that one operation can go on if the

22705 other one happens to bog down. We aim to operate our kilns continuously and that is a very important

factor in our business because shutting down and opening up a kiln involves considerable expense. In shutting down a kiln the lining cools down and cracks and may disintegrate so that it will have to be relined. In starting it up a substantial amount of fuel is required to reheat the kiln before you start to get any benefit from it for the calcining
22706 operation. There are no other reasons for storing at this stage in the process of manufacture except the two I have just mentioned. That is for the checking by the chemists and the flexibility between departments.

The purpose of blending is to make any adjustments in proportioning the chemical elements that may be necessary; that is, blending one batch of this raw material with another batch. It is in that way that a very high degree of uniformity in the chemical composition of the materials going into the kilns is secured. That was not so 25 or 30 years ago when we did not have the storage and blending facilities. We did have difficulty operating continuously without the use of storages. If the grinding department went down we would run out of supply for our kilns so that the storage facilities are helpful in that respect.
22707 This new development of storage has made it necessfor us to erect storage facilities in the shape of tightly closed bins and buildings and conveying equipment and things of that sort. It entailed a considerable expense.

I think my description has been almost entirely confined to the dry process, although we have touched on the wet process here and there.

In the beginning of the industry I think that the raw materials were perhaps the only determining factor as to whether it is a dry process or a wet process. If the raw materials were wet no attempt was made to dry them. They were ground in the wet state even to the point of adding more moisture to do so. Engineers began to find it was a little less expensive to build a wet process plant. About 10 years ago the development of long kilns came into being which removed the principal objection to the wet process, which was the high use of fuel, and at that time the wet process plant was in considerable vogue. The materials can be ground to the necessary fineness whether they are dry or wet. If it isn't very wet, but between the two then you have to add water so that it becomes a slurry which will easily flow and will not be gummy and sticky.

22709 *Examination by Trial Examiner Norwood.*

After it is ground in the wet process it is not dried and screened, but is then fed into the kilns. As I said before, prior to the advent of the long kilns, it took considerable more coal to burn the wet raw material because it contained so much water. But when the long kilns came along that objection was removed so that 10 years ago engineers were selecting the wet process type of manufacture irrespective of the moisture content of the raw materials.

Examination by Mr. Leisure (Continued).

Somewhere near one-third to one-half of the manufacturing is done by the wet process.

When Alpha acquired the St. Louis plant it continued to operate it as a dry process plant for several years but there we had a three component mix: our clay was rather wet and sticky. It was difficult to dry it while our stone would dry properly. The drying operation in the old plant was a rather crude method and for a combination of reasons we determined to change that plant over to
22710 the wet process which we did about 1925 or 1926.

In making a change of that kind, we had to change some of the equipment. It is the same type of equipment except you can not use centrifugal mills very well, but the ball mills and tube mills are useable if they happen to be of a satisfactory size and in good condition. At the St. Louis Plant the equipment was pretty old and antiquated. We discarded it and put in new grinding equipment for the wet process. We did not keep the same kilns that we had before in an attempt to offset the increase in the fuel consumption that we knew would follow the change to wet process, we lengthened our kilns from 110 feet long to 170 feet long. Even with the longer kilns the fuel consumption increased from 125 to 150 pounds per barrel, when we changed to wet process.

Examination by Trial Examiner Norwood.

It increased the fuel cost but there were offsetting
22711 influences; I mean, we made this change to clean up an expensive and unsatisfactory condition in the raw material department. We obtained our saving there but sacrificed some of it in this burning department.

Examination by Mr. Leisure (Continued).

The change was made to effect what I believed to be an economy at that time in the raw material department. It also affected large savings in the raw materials department but we had to sacrifice some fuel consumption. As a matter of fact that is usually the case whenever an improvement is made. If new modern equipment is put in to replace old, crude equipment, you are bound to get a power cost that you didn't have before. There are always offsetting factors in any improvement that is directed toward reduction in cost.

The wet process method is now used in the St. Louis plant whereby we mix the limestone, clay and alumina-bearing materials as slurries. Each of them, after they are crushed are fed to the grinding mills with enough water
to develop a slurry that contains approximately 35%
22712 water content. That is so it will not be gummy and sticky; will run through the grinding mill and be ground to the same fineness which is gauged on the same screen using a factor to translate the wet slurry into the dry result. After it is ground into a slurry it is stored in a series of tanks where it can be blended for mixed crush and eventually it is fed to the rotary kilns for the burning operation. The kilns are, generally speaking, longer in wet process plants in an attempt to offset the higher use of fuel required to dry the moisture. We made changes in the raw grinding department. No changes to the kilns other
than the lengthening of the kilns, were made at that
22713 time, that I can think of. That change materially reduced the capacity of the kilns even with the extended length, because with the same size kiln the capacity of a wet process kiln is only 60 or 70% of that of a dry kiln. Subsequently we substituted the larger units for the smaller units. More recently we enlarged the size of our kilns, that is, after having changed over to the wet process and increased our fuel consumption, we were not satisfied so we hunted around for a way to reduce that fuel consumption. We wound up by installing—I am sorry to say—a German made machine called a calcinator, which takes the moisture out of the slurry by reducing it from 35% to 10 or 12% in a separate operation. Nodules from the calcinator are fed into kiln and in order to fit these new machines with a proper size kiln we took out 4 of the old

kilns and replaced them with 2 larger kilns which we extended in length to about 230 feet. In doing all of
22714 this we succeeded in reducing our fuel consumption from 150 pounds to less than 100 pounds. We are now running in the low 90's, and that took us back below where we were before we changed over from dry to wet process. The same kiln will produce about 60 to 70%; wet. There is a practical limitation on the length you can build wet process kilns. The largest kilns in this country are 400 feet long. I believe there is a kiln as long as 500 feet in some other country, I have forgotten where. I knew where it was at one time but in this case we did not need them that long because we put this calcinator in to take the place of some of the kiln length. The combination of calcinator and 230-foot kiln is fully equal to a 400 foot kiln length. It happened to be a better way for us to accomplish that purpose; that is, to develop the minimum fuel consumption, because of the layout of our St. Louis plant
22715 which would not admit the installation of 400 foot kilns without more changes and more reconstruction work than was required the other way. The advantage of installing these calcinators was to reduce the fuel consumption. The power required to operate these calcinators is about 100 horsepower which includes the fan; that is, the calcinator and the fan which is required to draw the gases through them; about 100 horsepower added to our former requirement per kiln; 200 horsepower for 2 kilns. That has the effect of offsetting the saving in fuel. The longer kiln requires more power to dry and the whole outfit requires more labor in attending it. There are, as I said a while ago, offsetting factors in almost all improvements of that kind.

The St. Louis plant has been pretty much rebuilt. We installed electric shovels in the quarry; we have a unique haulage system in the quarry; an electric haulage system known as the Woodford system where cars run all around the quarry under the direction of one man up in a tower.

We rebuilt the raw grinding department in connec-
22716 tion with changing over to wet process; we rebuilt the kiln department and in that connection rebuilt our coal grinding department twice, the last time installing unit pulverizers directly connected to the kilns. Coal as shipped from the mine must be ground to a very fine powder, to an 85 or 90 per cent thru 200 mesh sieve which we have been talking about.

22720 Washington, D. C.,
September 7, 1939.

22721 JOHN F. MAGEE thereupon resumed the stand and testified further as follows:

22722 Most of the improvements which I have described were necessary for the change from the dry process to the wet process for the manufacture at the St. Louis plant. There were some changes such as the improvements in the coal grinding plant and the enlargement of the blending facilities which were auxiliary, but even those improvements, being of the latest type, were almost a necessity in connection with any other changes that were being made at that time. The changes did improve the quality of the
22723 cement. The essential difference between the wet and dry process exists in the process that has been described up to this point. From that point on there is no difference. Now in the storing and blending of raw materials it is the same, whether it is the wet or dry process. In the early days it was not customary to store dry raw materials to any very large extent. Wet raw materials have always been stored because it was rather impractical to pass them on to the kilns without a certain amount of blending, but in recent days the same storing and blending has developed in the case of the dry process, so that today the wet process plants and the dry process plants are essentially alike in that respect, too.

The kiln is the piece of equipment in which the raw material is calcined, and for that purpose the materials, whether they are wet or dry, are fed into the kiln. Calcining is really two or three operations. In the first place any moisture is taken off, small amounts in the case
22724 of the dry process, and large amounts in the case of the wet process. Carbon dioxide is driven off, changing the lime and magnesia from carbonate to oxides; and the silica and alumina elements are combined with the lime elements in various combinations, the whole mixture being brought up to that point of incipient fusion which is contained in the definition of cement. The temperature at the front end of the kiln is 2700 to 3,000 degrees Fahrenheit.

As these gases pass to the rear of the kiln and depending upon the length of the kiln, the temperatures come down to 1500 or a thousand degrees Fahrenheit, in the case of shorter kilns. In the case of long kilns on the wet process these temperatures get to five or six hundred degrees Fahrenheit. When I speak of degrees, I mean Fahrenheit in each case. I mean that the temperature in the front end of the kiln is of a very high degree of heat. 2700 to 3,000 degrees Fahrenheit is enough to melt all sorts of metals; even iron and steel will melt at those temperatures.

22725 In our various plants we use the same kind of kiln but they are of different sizes. The rotary kiln is the type of kiln that is used exclusively in the industry today; it is a revolving cylinder varying from five or six feet in diameter to forty feet in length, in the very old plants, although there are not many of them still in existence. They run in diameter up to ten or twelve feet and in length as high as four or five hundred feet. The small kilns are not what you call big machinery. The large kilns that I described are what you would call big machinery. These 400 feet kilns are probably the largest pieces of moving machinery in the world. They have to be hauled around by the trainload rather than the carload, they are very large equipment.

22726 These kilns are fired by a pulverized coal which requires a special coal with a high volatile content.

22727 The reason for pulverizing it is that pulverized coal will ignite and burn more quickly than if you don't pulverize it. Alpha does its own pulverizing. When we get through the cost is more than the coal you buy, but the type of coal that we pulverize is bought on the open market. We take the higher grade coal and pulverize it, that is, higher grade in the sense of high volatile matter but not higher grade in the sense of steaming qualities; and not higher priced. Alpha has machines at its plant to

22728 pulverize coal. These machines are large units, these days, requiring a considerable amount of electric power. They are motor driven in all cases.

22729 Alpha keeps some kind of a record as to the consumption of power in their daily operations at all the plants. In some plants that is a matter of actual measurement of each piece of machinery; at the other plants it is a measurement of groups of machinery or departments, with estimated breakdowns as to each piece of machinery.

As to the power rate the figures that I have in mind are twenty to thirty kilowatt hours per barrel. I do not have the per ton figures in mind. The power requirement is now about 50% more than when I entered the industry or first became employed by Alpha in 1913. The special coal used for pulverizing is found in several locations in the country; not many. High volatile coals are prevalent in northern West Virginian and western Pennsylvania, also in the West Virginia-Kentucky field. There is some in Colorado. The fuels there are suitable for rotary kiln operation, and at some locations in the Pacific Coast.

22732 The average fuel consumption of Alpha, taking into consideration the various mills, differs slightly from time to time. It is somewhere between one hundred and one hundred five pounds of coal per barrel. I intended to include southern Illinois in my statement as to the sources from which we secure coal. That is a district that escaped my mind a moment ago. I mentioned Alabama the other day, too.

22733 Calcining a barrel of cement which weighs 376
22734 pounds is produced from the burning of about 625 pounds of raw material.

Q. Now taking up another subject, Mr. Magee: Is this cement which comes out from the kiln, after you have baked it, as you described, or calcined it, to use the technical term—

A. No, we call it clinker, in that form.

Mr. Wooden: There, again, Your Honor, we are going over ground we have been over a number of times in the last few days, I think.

Trial Examiner Norwood: Does the Counsel wish to strike the answer and object to the question?

Mr. Wooden: I do.

Trial Examiner Norwood: The objection is sustained and the motion allowed.

I think any further testimony as to the details of the manufacture of cement should be excluded, and I shall ask the counsel for the respondents to make a proffer of his evidence, here.

Mr. Leisure: I beg your pardon. I didn't hear the last part of your statement, Mr. Examiner.

Trial Examiner Norwood: Make a proffer on the record of what you propose to prove by this witness.

Mr. Leisure: If Your Honor pleases, it is so basic
22735 and so elemental, the necessity of putting in the groundwork of our case, that I am really taken aback a little that counsel should even object to it. It is like one of those ordinary things such as the article "the." It is so elemental—

Trial Examiner Norwood: If it is so basic and elemental it will be very easy for you to tell me what it is.

Mr. Leisure: I hardly know which place to start.

Count one, paragraph three, alleges that the raw materials and necessary fuels are found in numerous parts of the country. That is an allegation which is in the complaint, and the Commission's expert witnesses, as Your Honor well knows, have taken the position that the materials for manufacturing cement can be found in, oh, numerous parts of the country. It states they don't have cement plants but could have them, except for this gigantic fraud of marketing conditions; they could be located there.

The inference can be drawn, and, in my opinion, will be drawn by counsel that these basic materials can be found in various parts of the country, whereas the facts are, and which we are going to show, if Your Honor will allow us to, that that is not true at all; that it requires that
22736 not just any limestone can be used to make cement, but it is a special limestone required to make cement; not just any old coal will do to make cement, but it is a special coal.

Now, if I am deprived of the opportunity of showing what the process is, and why it is a special process, if I am deprived of the opportunity of offering—

Trial Examiner Norwood: Now does that go to this issue of whether or not this material can be found in numerous parts of the country? If you will confine yourself to that, you may do so.

All these little details you are bringing in as to the process of manufacture don't go to that at all.

Now, what else do you want to show?

Mr. Leisure: Well, it is our position, and will continue to be our position in arguing it in our briefs, that it is necessary to lay this foundation and show the method of manufacturing cement in order to bring out what these special materials are. In other words: How is cement manufactured? Why is it a special limestone that is needed, and it is our position—

Trial Examiner Norwood: You want to show the fact that it is needed, the fact that it can be procured in a very few places.

Mr. Leisure: Yes.

Mr. Wooden: Your Honor, the allegation in the
22737 complaint about the raw materials being found in numerous places; how many is numerous? There are 75 companies and 150 or so plants scattered around the country from Maine to California in various places. Isn't that numerous? Isn't the raw material distributed?

Mr. Leisure: May I just continue and state my position, and Your Honor may overrule me if I am wrong. I would like to state what our position is, though.

May I continue?

Trial Examiner Norwood: Yes.

Mr. Leisure: Not only do we feel it is necessary to meet that charge in the complaint head-on, and the testimony of the expert witnesses which counsel have called—

Trial Examiner Norwood: Do you think that is a relevant charge?

Mr. Leisure: A relevant charge in the complaint?

Trial Examiner Norwood: Yes.

Mr. Leisure: I hope so, because I would hate to have spent time on a charge in the complaint that is not relevant. I hadn't given consideration to that. I proceeded on the assumption that it was.

But going on further, Your Honor, the Commission has offered much evidence, both oral and documentary, showing overcapacity, and further evidence, documentary
22738 and otherwise, showing the causes of it.

By this testimony we are showing the necessity of large units and that bears directly on the subject of overcapacity, so that—

Trial Examiner Norwood: Well, now, are you going to show the existence of overcapacity; whether or not it exists? Did he go into the reasons for its existence? Is that in issue?

Mr. Leisure: Yes, that has been placed in issue by the Government. They have not only made allegations to that effect, but they have called witnesses to prove it, and they have offered much documentary evidence showing overcapacity; and that bears—

Mr. Wooden: That goes—

Trial Examiner Norwood: Let him finish.

Mr. Leisure: May I finish?

Trial Examiner Norwood: Yes, let him finish.

Mr. Leisure: That bears upon the location of mills as to whether they are poorly located, and I am coming to that now.

In count two, paragraph nine, there is the charge that this alleged system of pricing has resulted in the preservation of poorly located and inefficient mills. That is a charge that some of our mills are poorly located, and
22739 it is a charge that some of our mills are inefficient.

It does seem to me that we should have the opportunity of meeting that by showing what our operations are. I can't put in our whole defense with one witness, but I can show what our operation is, I hope, with an operating man who will show what the operations of his company are.

There are 75 companies here and I am merely endeavoring, at the moment, to show what the operations are so that I may later call witnesses to refute this allegation in the complaint and the testimony which has been offered under it.

Then, too, that charge affects the public interest.

The Commission's witnesses, in keeping with the entire theme of count two, imply that the public interest would be better served if what the Commission calls the poorly located mills were relocated and better located.

Now, the only way that I can prove that the Commission doesn't know the cement business very well, when they make allegations of that kind, is to prove—

Trial Examiner Norwood: Is that an allegation of fact or simply a statement as to the effect of certain methods? What it would do in the case there were poorly located mills?

22740 Mr. Leisure: I read it as an allegation of fact. That is the way it appears to me.

Of course, I don't know what the Commission had in mind when they—

Trial Examiner Norwood: And you could refute that statement as to effect by showing, in fact, that there were no poorly located mills?

Mr. Leisure: We are going to show, if we are allowed to, that those allegations that the Government make, and the testimony that they offer under them, is incorrect and—

Mr. Wooden: I thought we were—

Mr. Leisure: May I finish?

Mr. Wooden: Let us get back to the question that is pending.

Trial Examiner Norwood: Let him finish.

Mr. Leisure: And as bearing on that charge and the testimony the Government has offered under it attempting to show our mills are located here and there where we can take advantage of this gigantic conspiracy, this marketing system, that we have located the mills at various places for that purpose: To refute those inferences which have been clearly set up by Government witnesses so far we propose to show that these plants are not located for

22741 the purpose of taking advantage of markets but for the purpose of taking advantage of raw materials and—

Mr. Wooden: You will find no connection between that and the pending question.

Trial Examiner Norwood: Let him finish.

Mr. Leisure (continuing): —and the size of the plants. When I asked about the size of this machinery it goes to the weight of his testimony on the size of the plant; whether or not they can be re-located. That is something the Commission should know, because that inference is clearly to be drawn from their own witness' testimony; that the plants could be re-located to better advantage, so that it is material to go into that part of it.

It is true that the complaint deals with marketing methods but we want to show that the market methods develop, not as the Commission seems to suppose, from a conspiracy, but from the character and peculiarities of the location of the plants which are located at these places because not only of the marketing facilities but, primarily, because of the raw materials and—

Mr. Wooden: This is a question of the size of machinery, or something like that.

Mr. Leisure: If Mr. Wooden can contain himself until I finish—

22742 Trial Examiner Norwood: He is making his statement here of the proof he intends to offer.

Mr. Leisure: —and the nature of the product is dictated by the location and kind of raw materials and fuel required and that affects the marketing system, and we are not in a position to even attempt to meet charges about

the marketing conditions until we have first laid the foundation for the basic reasons for some of these actions which the Government has charged were the result of conspiracy.

We can show that they originated in another way, and are being carried on because of other reasons. As to whether we are wasting time—

Trial Examiner Norwood: Do you mean you are going to show that the marketing methods arose from the necessity of the case?

Mr. Leisure: That is part of it, there isn't any question about that, and that is why I want this operating man to tell us how it originated and how it is being carried on today.

As to Mr. Wooden's repeated objections that I am wasting time: In similar cases I know Your Honor will know where juries were waiting, moving pictures were shown to show the complete process in these anti-trust cases in the courtroom, and I don't believe I am wasting time
22743 when, out of 75 companies, I select one man to lay this basis as quickly as I can instead of calling in men from each company.

It seems to me I should be allowed a little leeway to lay the basis for our defense.

Trial Examiner Norwood: I have allowed you two days to show the process of manufacture.

Mr. Leisure: Two days, compared to what the Government took in this case, with a man that we have shown to be one of the biggest men in the industry. I don't believe I am encroaching on the time of the Commission at all.

I can finish with this witness quickly if I am not interrupted, and I don't believe I am aking questions that would harm the Government's case in any way.

Mr. Wooden: I don't think you are, either. I say they are wholly irrelevant and immaterial.

Trial Examiner Norwood: I have stated my view on this several times. If I can see your questions apply to any one of these three points I have indicated I will admit it, and if they don't and you can't show me that they apply, I am going to exclude it.

Mr. MacIntyre: If Your Honor please; paragraph three of the complaint, as was called to your attention yesterday and the day before, merely avers that material for
22744 cement is found in numerous parts of the country.

The answers as filed by Mr. Leisure's firm, counsel for most of the Respondents here, and in mimeographed form, copies running more than sixty in number for various Respondents, carry this term with respect to—or this portion of the answer with respect to that portion of the allegation, that these materials were found in numerous parts of the country—

Mr. Leisure: That same argument was made by Mr. MacIntyre yesterday.

Mr. MacIntyre: I merely refer to the answers of the Institute for the Kosmos and the others for which Mr. Leisure is counsel.

"This Respondent avers that the cement is made from various raw materials including slag and marl, as well as limestone and shale."

That is not contrary to the allegation of the complaint in paragraph three. The answer continues further and says:

"Except as hereinabove set forth, this Respondent admits the substantial accuracy of the allegation of paragraph three."

They are not in issue so why take up days and days when it is not even in issue. It is already admitted; everything, with respect to paragraph three, in the very answers 22745 filed by Mr. Leisure, more than sixty in number.

It seems a waste of time to admit facts and then attempt to prove them later when he has admitted them.

Mr. Leisure: That allegation was made and that answer was filed and after that, carrying out the allegations of the complaint, they produced experts who attempted to convince Your Honor that these plants could be re-located, that they were improperly located, and that they were located where they were because of this gigantic conspiracy, so that certain non-basing mills could take advantage of their location. That is why I have to go into it.

Trial Examiner Norwood: Is it the contention of the Commission that this pricing method and system, the alleged pricing method and system, has caused mills to be located from other than economic considerations?

Mr. Wooden: Your Honor, I would say that the testimony of the experts is to the effect that given the combination or the set of facts put to them in the hypothetical question based upon the practices in the industry, in re-

sponse to that they did say that the necessary theoretical effect of such a combination was to produce inefficiency and to maintain inefficiency.

Trial Examiner Norwood: And to permit mills to be located where they otherwise would not be?

22746 Mr. Wooden: Yes; I will say that.

But I say that this testimony that is now in question does not go to that issue at all and none of that that we have had the last day or two goes to that issue.

Trial Examiner Norwood: He wants to show, as a matter of fact, that none of those mills have been so uneconomically located.

Mr. Leisure: And that they are not located there for the reason which the Commission says, but for the reasons which the engineers will explain to Your Honor, if they are allowed to.

Mr. Wooden: We don't say that mills were located at certain places as a part of any combination, but as the result of a combination, why, mills may be located at some points they shouldn't be.

Trial Examiner Norwood: Does the Commission claim that there were any mills that were so located uneconomically?

Mr. Wooden: I would not pretend to say any particular mill is so located. I wouldn't undertake to.

Trial Examiner Norwood: Would you stipulate that there are no mills so located?

Mr. Wooden: No, I don't believe I would, Your Honor. Personally, I believe there are. Under the necessities and facts and circumstances of the case there are bound 22747 to be some, but I don't pretend to say which ones.

Mr. MacIntyre: The answer to that, if Your Honor please, is just this: It is not so much that the combination that is charged got themselves together and agreed to locate a mill over here at point A and another at point B, but that the results of the combination brought them to certain locations.

Now, of course, as long as it works the way it does it does, economically, bring them there under the economies of the industry. Of course this witness couldn't do anything but agree to that sort of a theory, but he didn't have anything to do with the location of the mills there.

As he already testified, the mills were located at the

present locations many years before he came into the company, or was connected with this industry.

Trial Examiner Norwood: Do you think that the proving of these half a dozen mills here that belong to this chain were located from purely economical considerations, do you think that, that disproves there were no mills otherwise located?

Mr. Leisure: I can't prove my whole case with the first witness. It took the Government a long time to unfold its case, over a long period of time. There seems
22748 to be a variance in Mr. MacIntyre's statement. He now says that they are located economically, whereas the complaint says they are uneconomically located.

Trial Examiner Norwood: It seems to me in these studies and in this correspondence it is contended that these studies and some of this correspondence shows that if it were not for this system, that these mills would have to suspend. Do you want to show differently from that?

Mr. Leisure: That all depends on who said things of that kind.

If Your Honor has reference,—and the only reference I know of to things of that kind,—if Your Honor has reference to where some salesman writes a letter and attempts to pass upon the economic condition of the industry; if we have to refute that kind of testimony, I think this would refute it, but I don't intend to spend time on doing it, no. I don't intend to take those things up in detail.

Trial Examiner Norwood: You have a right to meet that.

Mr. MacIntyre: But by his own admission he is not attempting to meet that. He is attempting to show the details of the manufacturing of cement.

Trial Examiner Norwood: That point is very
22749 well taken.

Mr. Wooden: That is why I say come back to the pending question.

Trial Examiner Norwood: Yes.

If you will get to these three issues, here, as to these materials being available in numerous parts of the country, and as to the necessity for overcapacity, and as to whether or not there are any poorly located and inefficient mills that are still doing business when, under competitive conditions, they would not be in operation; now, those three,

you may go ahead and introduce your evidence on, but these small details of manufacture, I am going to exclude them. We haven't any time for them. It is too serious and too big a case to be wasting time on that.

Mr. Leisure: Then is it Your Honor's ruling that in an anti-trust case of this character we are not allowed to show the method of manufacture of the product we are talking about?

Trial Examiner Norwood: You have already shown it.

Mr. Leisure: No, we haven't, Your Honor.

It won't take much longer, if you will let us finish, because we have got down to where the product comes out of the kiln.

Trial Examiner Norwood: Will Counsel try to boil it down?

22750 Mr. Leisure: I will.

Trial Examiner Norwood: Go ahead.

Mr. Leisure: I don't know just where we were, Mr. Reporter.

Trial Examiner Norwood: We will have a five-minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: Go ahead.

Mr. Leisure: There is one other heading, Your Honor, I would like to add to the ones I have named, and I would like to ask the witness question under that subject now, and that is the technological improvements, and I would like to ask him questions along that line.

Trial Examiner Norwood: You want to show whether or not the industry made technological improvements during these past years?

Mr. Wooden: I contend, Your Honor, it is irrelevant and immaterial, and, furthermore, we have gone over that ground quite a bit, already.

I will be willing to stipulate that they made technological improvements.

Trial Examiner Norwood: You will be willing to stipulate that?

Mr. Wooden: Yes.

Trial Examiner Norwood: I think that eliminates 22751 that issue.

Mr. Leisure: Well, Your Honor, I want to be able to lay the foundation for future testimony in view of

these questions, and there are only three on the subject. I think I would rather not take the stipulation. I wouldn't save any time by it.

Trial Examiner Norwood: If he admits they have made them, what further do you want to show along that line?

Mr. Leisure: We want to show the extent.

Mr. MacIntyre: Now, if Your Honor please, what difference does it make whether the improvement has resulted in the adoption of a gear that has five teeth rather than four?

Trial Examiner Norwood: Do you want to show that they have made such substantial improvements that will reduce the cost of manufacturing?

Mr. Leisure: They have, unquestionably. That is one of the elements in it.

Trial Examiner Norwood: Well, is that included in your stipulation?

Mr. Wooden: I would be willing, without any knowledge on the subject, direct knowledge on the subject, to admit that the technological improvements made have resulted in the reduction of cost of production.

22752 Mr. Leisure: Of course the difficulty with accepting a statement of that kind, Your Honor, and then trying to build our case afterward on it, is that it doesn't cover the field sufficiently.

There has been progressive improvement both in the quality of the product and keeping the costs of manufacture from increasing in the face of more rigid requirements, as the witness told us yesterday, and I feel that I have got to go into it a little.

Trial Examiner Norwood: Suppose you state your complete contentions along that line and see if he doesn't agree to it, and let us eliminate this particular thing.

Mr. Leisure: When we come to a specific question on that may I do it in that way, because I am not an engineer, and any specific thing that comes up, if we can state it and save time, I will be glad to do it. I can't do it with the whole subject.

Mr. MacIntyre: On this last point I think it is so much a matter of common knowledge that it is readily admitted here that whatever improvements made in the industry were progressive. They weren't by revolution, overnight;

that they have been evolved in a progressive manner, and that is admitted.

Trial Examiner Norwood: I don't see why that wouldn't eliminate that as an issue in the case. It
22753 would save these Respondents time and expense from going into it at length.

Mr. Leisure: I will take up another subject, for the moment.

Direct Examination by Mr. Leisure (Continued).

After the raw materials come out of the kiln, it is called clinker—not cement. It is required to be ground to a very fine state before it becomes cement. At the present time the general practice is to cool the clinker mechanically so as to prepare it for grinding almost immediately. In the past some quantity of the clinker was prepared for grinding by storing or seasoning.

22754 After the clinker is ground into cement, which is a major operation, it is stored pending shipment. The final step in the manufacture of cement is the finish grinding operation, which is somewhat similar to the raw grinding operation; big ball mills, tube and centrifugal mills, requiring large amounts of power.

Cement is ground today by all companies to finenesses in excess of 90%; from 90% up to 97%, 98%, passing through the 200 mesh sieve. In the final process the equipment in the plant is similar in size and expense of operation to the other equipment I have mentioned; very large equip-
22755 ment. The air separation is an intermediate stage in the grinding which has come into practice in recent years due to the increase in fineness specifications. The finer you grind cement the less production you can get from your equipment, and the more power is required. But if you can take some of the finely ground cement out of the stream during the process by means of air separation, the efficiency of the grinding operation is somewhat improved, thus tending to offset the increase of cost that comes about in the finer grinding. This air process is a recent development.

22756 There are four labor steps in the manufacture of cement, the fourth being the final grinding. There are some 75 or 80 individual operations in the process of manufacture.

The reason for the silo type of storage house is to make cement more accessible for drawing it off. The old type of storehouse was just a large rectangular building with cement distributed in it in bulk. It had tunnels and conveyors underneath but it required a good bit of manpower for the proper handling. There was an intermediate step: As bins became necessary for special tests and special specifications those old types of storehouses were partitioned forming bins, but when the silo type of storage was developed in the grain business it was quickly realized by the engineers in the cement industry that that was a better type of storage for their purpose. In recent years practically all storages have been built of that type be-
22757 cause they provide easier handling and provide for individual bin space which is required. In my experience and in terms of production, something like two or three months' production space is required to properly operate our business. When I say "properly" I have reference to peaks of demand: to store enough cement in the wintertime in order to take care of our summer peaks and thus keep our men employed in the wintertime. It is a matter of taking care of business as it comes to us and taking care of the employees who work in our plants.

The next move is to draw the cement from storage and ship it as we receive orders for it. That is an im-
22758 portant phase of Alpha's operations. Preparation is necessary. It always has to be tested; sometimes by State highway or Government laboratories; sometimes by commercial laboratories who are retained by contractors or customers. But in all cases it is tested by us very rigidly as we put it in storage and as we take it out of storage for shipping. That applies whether the cement is shipped in sacks or in bulk. The testing has become more rigid since I first entered the industry. The packing has changed. In the early days cement was just pulled out of storage into barrels or into open bags which stood on scales and the weight was adjusted by scooping in, just as a grocer scoops sugar in or out of his bag on the scale. About 20 or 25 years ago, an automatic packing machine was developed so that today bags are filled after they are tied. That may seem remarkable, but they are. Cotton bags are tied and placed on the machine upside down, the cement going in a flap and paper bags are manufactured
22759 with closed tops, bottom and top both closed, with

just a sealed flap through which the cement is inserted. It is now partly a mechanical operation.

I mean the same thing when I say bags and sacks for they are the same size. A bag or sack of cement weighs 94 pounds, that is, one-quarter of the 376 pounds in the barrel. In the early days the receptacle used was the barrel, a 400-hundred pound package, the barrel weighed about 24 pounds, which left a net weight of 376 pounds and which became the barrel unit. At a very early stage of the industry in this country the barrel was adopted by the Bureau of Standards as a standard unit of measure for cement. After the barrel went out of vogue they determined that the bag would be one-quarter of a barrel, and that developed a 94 pound weight, which is also standardized by the Bureau of Standards.

22760 Alpha makes bulk shipments. It has been developing in recent years, but a customer can't use it unless he has a big job or uses a steady supply of cement so that he can afford to install mechanical equipment to handle it that way. It somewhat interferes with the regular routine of our packing operation to ship it in that manner. In these days of labor unions, men squabble about who gets that work and who does not get that work, but it is developing that somewhere between 10% and 15% of our business is bulk shipments these days. There is very careful supervision over this process by the chemists to see that cement that is tested by certain people is received by them and, of course, many laboratories, particularly federal and state government laboratories, have inspectors to supervise the work in our packing house.

There is a difference in the loading between shipments by bags and bulk shipments. The bulk shipments interfere very much with our regular operation. Packing is a

22761 piece-rate job. The men are paid by the piece rate and it is rather difficult work. They earn as much as a dollar and a half an hour. They don't like to be disturbed and asked to go off and load some unusual type of equipment. They don't like bulk loading, and, on the other hand, they don't like to have anyone else do it because it cuts down their earning power and it interferes with our routine.

22766 Trial Examiner Norwood: I want to be understood in my recent remarks, here.

To be discussing the situation as it is at this point
22767 my position is that there is no use of any further testimony as to technological improvement or its extent, because you have already shown, and you have been two days, here, showing the extent of technological improvement, and I think we have had enough of it, and then, at the end of this time, the Commission has admitted it. I think we are through with that.

Let us save time and get on to the important issues.

22771 By Mr. Leisure:

Q. Now, we have had in this case, Mr. Magee, considerable testimony concerning the cost of construction of the cement plant. I want, now, to take up the sub-
22772 ject of the comparison between the cost of a plan that purchases its own power and one which generates its own power.

I think I can save time by just dealing with certain principles rather than have you give any detailed account of the plants.

Q. In your experience with your own plant is there any difference as to the cost of construction of these two types of plant, Mr. Magee?

A. Yes, sir.

Q. What is that difference, if you know?

22773 A. The cost of a plant equipped with a waste-heat power plant is about 25 percent more than the cost of a plant which has no power plant at all but purchases power from a public utility, electric power.

Q. From what you have said in describing those differences, do you mean the use of this waste-heat boiler affects the consumption of power?

A. It increases the consumption of power, yes, but my answer was directed toward the cost of construction of the cement plant.

Q. Taking up a new subject, Mr. Magee: As to the
22774 standard Portland cement, you have already told us, I believe, that there is a substantial difference in the quality of cement as of today as compared with when you started in the industry. There have been these improvements.

Does your product meet the standard specifications which are set by the requirements? You mentioned that you had these different inspectors from State and Federal Gov-

ernments. Does your own product meet with those standard specifications?

A. Yes, sir; it more than meets the standard specification, which is the A.S.T.M. specification.

Q. What is that?

A. That is the American Society for Testing Materials.

Q. What is that?

A. Well, that is a voluntary association of engineers and consumers, manufacturers, including many of the Government bureaus, such as the Bureau of Standards, the Bureau of Reclamations, the War Department, and the Treasury Department. I don't know whether the Procurement Department is in it or not; that is sort of a new development.

Q. Then do I understand that all Portland cement does meet this standard specification, from what you have said?

A. Well, it wouldn't be possible to sell much of it if it didn't meet it. Of course, it is a voluntary matter, but a company that made cement that didn't meet the
22775 standard specification wouldn't get very far. In fact, you wouldn't get very far if you didn't meet the specifications by a generous margin.

Q. That is, there is no compulsion, but you do, as I understand your answer, meet those specifications?

A. Yes, sir; as a commercial necessity. There is no compulsion but it is a commercial necessity.

Q. Mr. Magee, is there any difference in quality between the various portions of your output at a given mill; I mean, as to uniformity?

A. Very little. A great deal of effort is made on the part of our operating organization and our chemical staff to keep a very high degree of uniformity. Our raw materials and cements are tested hourly and a very close watch is kept so that there is a very high degree of uniformity.

22776 Q. From the various plants?

A. From the various plants.

Q. That is, you are interested in having this at a given standard, promoting this standardization?

A. We set our standards considerably above the accepted standard of the A.S.T.M., or even above the Bureau of Standards' standard in order to be sure that our cement, when tested, will be found well above the specifications. There is a personal equation that enters into all cement

testing work, in fact, all laboratory work, and we have always allowed ourselves a margin of, for instance, 50 pounds in tensil about standard specification.

Q. Does it have anything to do with simplifying your manufacturing process?

A. Well, standardization simplifies our operation in the sense that we know just what kind of a product we have to make at all times, but, of course, standardization tends to raise the level of specification and has the effect of increasing costs.

Q. Does it have anything to do with the dependability of the product?

A. A very great effect on that. Before there was a standardization of cement the product of various plants, various mills, varied and in many cases was not dependable. About the only protection the customer had 22777 in those days was the integrity of the manufacturer.

Q. You say as to the early days: Does that mean that the standardization came on recently? How long has that been in effect?

A. In 1904, it was, that the engineers, Civil Engineering Society and other engineering societies, got together and wrote a standard for cement which was adopted by most people that bought cement, and those companies who made cement.

Prior to that time there was not only a great variation in the quality of the product but, on that account, there were many individual specifications written by individual manufacturers, and there was considerable confusion as to what the customer wanted and what he didn't want, and what the manufacturer had to offer and what he didn't have.

The standardization in 1904 was welcomed by all sides; that is, customers, engineers, and by the manufacturer, as well, although the idea of standardizing was promoted and developed by engineers and consumers.

Q. And you have told us these things of your own knowledge as an engineer; I mean, as to the reasons for the engineers providing these standardizations?. Is that correct?

A. Yes, sir.

Q. You mentioned yesterday about the aggregates, also. Did that have anything to do with the standardization, or

rather, the other way around: did standardization
22778 have anything to do with that?

A. Yes, it did. After the users of cement got their cement standardized so that they could depend on the quality, they still had a variation in the aggregates. That is, the quality of the sand or gravel and stone to contend with, and many poor concrete jobs resulted from poor aggregates after cement was standardized and a sure product, but as time went on considerable developments were made in the proportioning of sand and gravel with cement and in the selection of those materials, so that the standardization of cement, I think you could say, was followed —well, I know—was followed by an improvement in the mixing of concrete and an improvement in concrete work in general.

Q. I take it, from what you have said, that in the early days was less dependable, and it has been more de-
22779 pendable since standardization; is that correct?

A. That is right.

Q. I would like to ask you: Following the adoption of the standardization when cement did become more dependable, as you have suggested, was there any increase in the use of Portland cement?

A. Yes, considerable. As engineers came to rely on it, the purposes for which it could be used were considerably extended.

Q. And I think you have already told us that this standardization did affect the cost of your manufacture?

A. Yes, sir. The standardization led to an increase in the level of standards which ultimately increases cost, and right now it is growing in that direction at a pretty rapid rate.

Q. And I assume you are still meeting it, as you go along.

A. Yes, sir.

Q. You told us that there were many special requirements, yesterday. I assume that that also affects your costs.

A. That is correct. There are tendencies, right now, for Government bureaus and State highways to depart from the uniform standard that was adopted in 1905 and recognized up until about 1930; that is, new specifications imposing more rigid performance in certain respects and adding new items of specification to the picture.

Q. Now you say "adding new items"; What was
22780 the standard at, first, in 1904, when they first established it?

A. Well, there were a good many items of the specifications in 1904. The two controlling ones were the specifications of fineness of product, which was 75 percent passing the 200-mesh sieve, and tensil strength, the specification for which was 150 to 200 pounds per square inch on a specimen of one—that is a 7-day specimen, a specimen that had been aged 7 days and made from one part of cement and three parts of standard sand. By "standard," there, I mean the Bureau of Standards' specification.

The witness identified Resp. Exs. 402 A to F, 403 A to Z-6, 404 A to O and 405 A to F as the specifications and reports to which he referred, being the original 1904 specification of the American Society for Testing Materials, not only for cement but for test procedures.

22782 *Examination on Voir Dire by Mr. Wooden.*

22784 Q. Does a Government representative continue to be on the cement Committee C-1?

A. Committee C-1; yes, sir.

Q. Who is that?

A. Well, the chairman of the committee is Mr. Bates, of the Bureau of Standards.

Q. What is the basis of your information that Mr. Humphreys was connected with the Government?

A. Proceedings of the Society, with which I am familiar, of which I believe those are abstracts. Those papers that you have there are photostats of the proceedings of the Society. I have a complete set of those proceedings from the beginning; from 1904 to the present day.

22785 Mr. MacIntyre: What about its failure to show the personnel of the C-1 committee, this cement committee which had to do with the formulation of these specifications?

Mr. Leisure: It shows that.

Mr. MacIntyre: In its entirety? The witness did not seem to know about that.

Mr. Leisure: It shows that.

I think the witness can tell us about them better than I.

The Witness: I could do it if I had it in my hand
22786 as I talked about it.

Direct Examination by Mr. Leisure (Continued).

Q. Let us take them in the order in which I offered them.

A. These are photostats of material appearing in this volume.

This is the proceedings of the American Society for Testing Materials, 7th annual meeting, volume 4, 1904. It contains reports of various committees, Committee A on specifications for iron and steel, Committee B for specifications for cast iron—without reading all of those numerous committees on numerous subjects—and a new specification on cement by a new committee, which was C at that time. Committee C has since become known as C-1. It contains specifications.

22790 Mr. Paulson: (Addressing the witness) Does the report cover the whole history of standardization?

The Witness: No. These particular papers cover the specifications for cement as first adopted in 1904 together with the standard methods of testing which were devised at that time by this representative group of consumers and engineers.

22795 (RESP. EXS. 402 A to F and 403 A to FF were offered and received in evidence.)

By Mr. Leisure:

Q. Mr. Magee, I believe you have already told us that these were the first specifications and that they were later revised. When was that? When were they first revised?

22796 A. 1908, I think, was the first revision, and another revision in 1909.

Q. You say again in 1909?

A. There was one in each of those two years, as I remember it.

The witness identified Resp. Ex. 406 A to P as the standard specification for cement and testing procedure of the American Society for Testing Materials as revised in 1908 from those of 1904; Resp. Ex. 407 A-O as the stand-
22797 ard specification for cement and testing procedure adopted by the same Society as revised in 1909, the second revision.

Trial Examiner Norwood: Does that represent the standards that you observed and methods you followed?

The Witness: Yes, sir. The last one represents the standards as they were when I entered the industry in 1913.

Trial Examiner Norwood: And the entire industry followed those?

The Witness: Yes, sir.

Mr. Wooden: Mr. Magee, were members of the Cement Industry on this committee at the time these amendments to the specifications were made?

The Witness: Yes, sir.

Mr. Wooden: Was your company represented?

The Witness: At that time, yes, sir.

(RESP. EXS. 406-A to 406-P and 407-A to 407-O, 22798 inclusive, were offered and received in evidence.)

By Mr. Leisure:

Q. Now, Mr. Magee, without taking time to read any of the parts of those in the record, will you help me save time and just tell me, with one question, whether the change from 1904 to 1908 was a more strict requirement?

A. Yes, sir. All of the revisions—each revision is in the shape of more rigidity in the specification.

Q. Did that complete the revisions, Mr. Magee?

A. No, sir. There have been several revisions since 1909. There is one in '16 or '17, 1916 or 1917. There may have been one before that. I do not recall.

Q. 1917 I think is correct.

A. 1917.

There was one in 1926 or 1927. There may have been one in 1920. I am not sure of that.

Q. Apparently it is 1921.

A. 1921; that is right.

22799 Q. I find that I read a wrong number when I mentioned 1917 to you Mr. Magee. That appears to be the serial number, 17. The revision seems to have been in 1916.

The witness identified Resp. Ex. 408-A to T as the revision which he described which took place in 1916 of the specifications for testing methods and procedure, the first following 1909. These specifications stood until 1921. He further identified Resp. Ex. 409 A-P as the specification as revised in 1921.

22806 *Voir Dire Examination by Mr. Wooden.*

I do not know exactly who composed the committee that prepared these amendments represented in Resp. Exs. 408 and 409. The personnel changes from time to time. Each year new men are added and new men go off. Generally speaking, representatives from various Government bureaus, engineers, contracting firms, and the manufacturers are on the committee. It is an attempt to have representation from all factions interested in cement. I do not know how many cement company representatives were on the committee at the time these amendments were made. I should guess a dozen or perhaps a few more. Ten or twelve, maybe fifteen, out of probably thirty or forty would be my estimate. It is now more. I think the cement industry is represented to the extent of about one-third of the membership. The committee is larger now than it used to be and Mr. Bates, of the Bureau of Standards, is the Chairman of the committee.

22806 *Examination on Voir Dire by Mr. Paulson.*

Q. Is there such a society, to your knowledge?

A. Railroad Signal Society? I never heard of it.

Q. Well, as I understand, it is a society for testing materials, going into railroad beds, to whose recommendations the cement industry has paid a great deal of attention.

A. It sounds to me—I don't know—it sounds to me like a society for railroad folks. This is a—

22807 Q. Have you in connection with your work paid attention to observe their requirements and regarded their standards and specifications?

A. No. They have never written a specification on cement, that I know, without being familiar with the society. I should say that their work was probably confined to the use of cement, the mixing of concrete, and that sort of thing, which is the thing that railroad people would be interested in, how best to use cement for their purposes.

Q. To your knowledge, has there ever been another society for testing materials?

A. Never any society. This is the recognized society, recognized by all bureaus of the Government who are represented in this society by all engineers and consumers and manufacturers. That is the society.

Q. When was this society organized? When did it preempt the field?

A. I don't know anything about preempting the field. It was a logical development, that is, the standardization of iron and steel and all products. It was organized back in the 1880s, maybe 1870, back in there sometime.

Q. Has it, to your knowledge, always, since you have been in the industry, been the one and only society for setting up standards?

A. The one and only recognized by all bureaus as such, although occasionally Government bureaus depart
22808 from their specifications and make special Government specifications of their own, as sometimes happens.

22819 *Examination on Voire Dire by Mr. Wooden*

Q. Referring to Respondents' Exhibit, for identification, 410, it being the report of the American Society for Testing Materials, 1916, and referring to pages 639 and 640, which pages contain the personnel of the committee C-1 on cement, on page 640 there are 23 names that are listed under the head of "Producers." Can you tell us what producers each of those individuals so listed
22820 was connected with?

A. Some of them, not all.

Let us see, you don't want the "Non-Producers," 37 in number.

Thirty-seven non-producers and twenty-three producers.

The first name, Abrams, I though was an educator in Chicago.

Q. Give the initials, please.

A. D. A. Abrams. I know who he is. He has had various connections. At that time I think he was with the Lone Star Company.

E. R. Ackerman, I don't know.

Ernest Ashton was with the Lehigh Company.

C. W. Boynton, I can't identify him.

By Mr. MacIntyre:

Q. Is he with the Atlas Company?

A. I don't know. I don't know the gentleman.

Joseph Brobston has had several connections. I don't know him too well. He was with the Dexter Company in 1916, I think.

Q. He is now with the Hercules Company, isn't he?

A. He is the man. I think he was with the Dexter Company at that time.

Charles F. Conn is the Giant Company.

22821 Q. Is he the same Charles F. Conn who was the president of The Cement Institute in 1934?

A. I don't know who was president of The Cement Institute in 1934.

Q. But he is president of the Giant Company?

A. Mr. Conn is with the Giant Company, I think president.

G. P. Diekmann I can't identify.

Harry Drew, who is now gone, was the chief chemist of our company.

D. R. Fraser I can't identify.

W. H. Harding I can't identify.

Trial Examiner Norwood: Just call the ones you can identify.

The Witness: All right, sir.

Mr. MacIntyre: If Your Honor please, we would like the names of those who represent the cement companies by showing if he can or cannot identify them.

Trial Examiner Norwood: All right, go ahead.

The Witness: O. C. Hart I can't identify.

H. S. Hartsell I don't know.

T. A. Hicks I don't know. There is, was and is, a Hicks, chemist with the Atlas Company, but whether he is T. A. Hicks or not I don't know.

F. W. Kelley was, I think, president of the Helderberg Company, a small company in New York State.

22822 By Mr. MacIntyre:

Q. Is that part of the North American now?

A. Yes, sir. That was not part of the North American Company at that time.

W. M. Kinney was with the Universal Company.

Q. Is he also with the Portland Cement Association?

A. Was he?

Q. I say is he.

A. He is the man.

By Mr. Wooden:

Q. So listed there.

A. No, sir; listed as a producer.

Q. But isn't he with the Portland Cement Association?

A. No, he was with the Atlas Company in 1916; I am quite sure.

W. H. Klein was with a company in Tennessee. I have forgotten the name of the company. A small company operating in Tennessee.

Robert W. Lesley was the same company as Mr. Conn, the Giant Company.

John B. Lober was Vulcanite Company, I think. I don't know. I didn't know Mr. Lober.

Q. Is he shown there as vice-chairman of the committee?

A. Yes.

H. B. MacFarland is vice-chairman.

22823 Q. So is John B. Loder.

A. H. B. MacFarland is vice-chairman of the non-producers. It seems they had a vice-chairman for the 37 non-producers and one for the 23 producers.

Spencer B. Newberry was connected with one of the plants that is now part of the Medusa Company. I don't know whether it was Medusa or a separate plant at that time. He was quite a well known in engineering society circles and might almost have been on either side.

Portland Cement Association, J. P. Beck, I don't know who Mr. Beck is, or was.

N. S. Potter, Jr., I don't know.

Spackman Engineering Company, H. S. Spackman,—why they are listed as producers I don't know. They are a firm that tested cement, I think a Philadelphia firm. I don't know what they had to do with producing cement.

A. C. Tagge was the Canada Company.

I can't possibly know—I mean I was in the business at that time, but it was not my business to know everybody else in the cement industry. I have done the best I can to identify the men. At that time I would not know any of those men. They are men I have known or known about since.

22824 The producers' representatives whose names I gave were members of the committee which prepared and promulgated Resp. Exs. 408 and 409. This is the committee as it was made up in 1916 when this revision was made. The next revision was in 1921, and I presume there were some changes in the personnel of the committee by that time. I would say that the personnel of the committee in 1921 was substantially the same. It is a matter of record. I do not know whether we have it here, but there is another volume that would give the membership as it was in 1921. I have all of these volumes in my office library.

(RESP. EX. 408 was offered and received in evidence.)

22826 Trial Examiner Norwood: Well, now, were they observed, approved and observed, by the industry generally?

The Witness: Absolutely. They were the guide for the consumer in being sure of getting a reliable and dependable product, and the manufacturer quite naturally, almost as a matter of—almost had to conform to these 22827 specifications in order to sell his product any more.

(RESP. EXS. 409-A to 409-P were offered and received in evidence.)

22828 Trial Examiner Norwood: I shall receive Respondents' Exhibits 410 and 411, for identification, for consideration of only those parts which relate to the standards of producing cement and the personnel of the membership and committees which promulgated the same.

Mr. Leisure: Those parts which affect the standardization of cement in any way, as I understand it.

Trial Examiner Norwood: That is right.

Mr. Paulson: May the offer also include the identification of the American Society for Testing Materials? Does the offer include that,—those parts which help to explain what the society is and how it functions?

Trial Examiner Norwood: Yes, that relates to the personnel.

(RESP. EXS. 410 and 411 were offered and received in evidence.)

Direct Examination by Mr. Leisure (Continued).

22830 Q. Now, Mr. Magee, without going into these matters in detail in any way—let us see if I can cover it with one question: Between the time of the last revision up to 1916, and then between that date and the next revision in 1921, was the revision—did it end to effect a more strict or less strict requirement?

A. More strict; higher finenesses, higher tensil strength. The progress is always in that direction, requiring finer grinding and harder burning, and all that sort of thing.

Q. Now, we have gotten down as far as 1921. Was there any revision after that, to your knowledge?

A. Yes, sir.

Q. When was that?

A. I think it was in 1927, and one in 1930. I don't carry the exact dates in my mind.

Q. 1926 and 1930?

A. 1926, was it? Is 1930 right?

Q. Yes.

22831 The witness identified Resp. Ex. 412 A to S as the specifications and the method of test procedure as revised in 1926; Resp. Ex. 413 as the 1930 revision by the American Society for Testing Materials of the specifications. He uses both in his work every day, but states reference is made back to the original and all of the subsequent revisions.

22833 I offer in evidence Respondents' Exhibit 414, for identification, it being the American Society for Testing Material's year book, and it is dated 1927.

22837 (RESP. EXS. 412-A to 412-S, and 413, were received in evidence.)

22838 By Mr. Leisure:

Q. Again, Mr. Magee, without taking time to go into detail at all with 412-A to S, and 413, which are the revisions which you have described in 1926 and 1930 from the last revisions that you have told us about to 1926, did it tend to effect a more strict or less strict requirement?

22839 A. More strict requirement.

Q. And that also is true between 1926 and 1930?

A. Yes, sir.

Q. Have there been any other revisions down to the present time, Mr. Magee?

A. Yes, sir. There was a revision in 1937 and another in 1938. There may have been another in the interim; I am not sure,—I mean between 1930 and 1937 I am not clear, but I know there was a revision in 1937 and another one in 1938.

The witness identified Resp. Ex. 415 as the revision he had just described for 1937 and included the testing procedure. It also contains some tentative specifications which were proposed then for adoption at a later date. (22840) The personnel of the committee is also listed in that bulletin. He further identified Resp. Ex. 416 as the 1938 revision, also containing test procedure, one or two tentative specifications, and the personnel of the committee.

22841 (RESP. EXS. 415 and 416 were offered and received in evidence.)

Direct Examination By Mr. Leisure (Continued).

Q. Now, with respect to all of these: Have they tended to be, the specifications, less strict or more strict?

A. The tendency is more strict.

Q. Down to the present time?

A. Down to the present time.

Q. And does that result in a better quality of cement?

A. That is a moot question. Personally, I think it does.